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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 718

EDWARD F. GOLTRA, PETITIONER,

vs.

JOHN W. WEEKS, SECRETARY OF WAR OF THE UNITED STATES; COL. T. Q. ASHBURN, CHIEF INLAND & COAST-WISE WATERWAYS SERVICE, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 2, 1936

CERTIORARI GRANTED OCTOBER 26, 1936

(31,441)



(31,441)

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1 (Citation and Acknowledgment of Service.)

United States of America.

To Edward F. Goltra, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit in the City of St. Louis, Missouri, sixty (60) days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein John W. Weeks, Secretary of War of the United States, Colonel T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney, are appellants, and you are appellee, to show cause, if any there be, why the order or decree rendered against the appellants as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Charles B. Faris, Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, this 18th day of September, 1924.

C. B. FARIS,
Judge of the District Court of the
United States for the Eastern Division
of the Eastern Judicial District
of Missouri.

Service of the above acknowledged September 18th, 1924.

JOS. T. DAVIS,
DOUGLAS W. ROBERT,
Attorneys for Appellee.

Endorsed: Filed in the District Court on Sept. 18, 1924.

2 United States of America,
Eastern Division of the Eastern } ss.
Judicial District of Missouri.

In the District Court of the United States in and for said Division of said District, Be It Remembered, that heretofore, to-wit: on the 25th day of March, 1923, there was filed in

the United States and the plaintiff herein, Edward F. Goltra, each in its or his own respective way, were left in a position wherein it became impossible and unnecessary to carry out the plans for the mutual advantage of each and for the necessities of the Government which had theretofore been contemplated and begun as aforesaid. Thereupon and thereafter such negotiations were had between the plaintiff herein, Edward F. Goltra, and the duly authorized representatives of the United States of America and more especially of the War Department and the Secretary of War, at a contract was entered into between the said plaintiff and the United States for the future disposition of the said proposed fleet of tow-boats and barges hereinbefore referred to, which contract was in writing and is in words and figures as follows, to wit:

1. This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as the lessee, his heirs, executors, and administrators, party of the second part, witnesseth, that

Whereas, the party of the second part at the request of certain government officials as an emergency of war, in order to increase the output of pig iron, made certain arrangements for iron ore and coal properties with a view to reducing pig iron at St. Louis, Missouri; and

Whereas the United States Shipping Board Emergency Fleet Corporation, allotted to the Chief of Engineers the sum of \$3,860,000 for the construction of a fleet of towboats and barges for the primary purpose of transporting the said iron and coal to and from St. Louis, Missouri; and

Whereas, on the first day of August, 1918, the United States of America entered into contracts for the construction of nineteen barges suitable to use for the transportation of said iron ore and coal; and

Whereas the United States of America is about to construct by contract or otherwise a fleet of towboats for the purpose of towing the said barges, the construction of which in the opinion of the Secretary of War is necessary to enable the government to dispose of the said barges more advantageously; and

Whereas the said fleet of towboats and barges is especially designed for and adapted to the transportation of iron ore and coal; and

Whereas the said lessee has entered into various engagements and undertakings to increase the pig iron supply as a war measure, which may have created, and according to the contention of the lessee did create, obligations on the part of the United States to the said lessee, but which he entirely releases and discharges in part consideration of this lease, which engagements, undertakings, and lease are in furtherance of the original design for the assembling of coal and iron ore at St. Louis, Missouri, and for the increase of pig iron facilities:

Now, therefore, the said lessor doth hereby charter and lease unto the said lessee for a term of five (5) years, beginning with the date of delivery to the lessee of the first barge or towboat and terminating five (5) years after the delivery of the first barge or towboat the following-described property, viz:

Nineteen barges which are being constructed under contracts dated August 1, 1918, with the Marietta Manufacturing Company, of Point Pleasant, W. Va., the Dravo Contracting Company, of Pittsburgh, Pa., and the Dubuque Boat & Boiler Works, of Dubuque, Ia., and three or four towboats about to be constructed and described in accordance with specifications prepared or to be prepared therefor.

It is thereupon covenanted and agreed between the said parties as follows:

2. (a) That the said lessee shall operate as a common carrier the said fleet of three or four towboats and
8 nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal, and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made provided the *Secretary of War* consents to such use other than as a common carrier.

(b) That the lessee shall pay all operating expenses of the fleet and maintain, during the continuance of the lease, each towboat and barge of the fleet in good operating condition to the *satisfaction of the lessor*; and shall hold the

of the United States and the plaintiff herein, Edward F. Goltra, each in its or his own respective way, were left in a position wherein it became impossible and unnecessary to carry out the plans for the mutual advantage of each and for the necessities of the Government which had theretofore been contemplated and begun as aforesaid. Thereupon and thereafter such negotiations were had between the plaintiff herein, Edward F. Goltra, and the duly authorized representatives of the United States of America and more especially of the War Department and the Secretary of War, that a contract was entered into between the said plaintiff and the United States for the future disposition of the said proposed fleet of tow-boats and barges hereinbefore referred to, which contract was in writing and is in words and figures as follows, to wit:

1. This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as the lessee, his heirs, executors, and administrators, party of the second part, witnesseth, that

Whereas, the party of the second part at the request of certain government officials as an emergency of war, in order to increase the output of pig iron, made certain arrangements for iron ore and coal properties with a view to producing pig iron at St. Louis, Missouri; and

Whereas the United States Shipping Board Emergency Fleet Corporation, allotted to the Chief of Engineers the sum of \$3,860,000 for the construction of a fleet of towboats and barges for the primary purpose of transporting the said iron and coal to and from St. Louis, Missouri; and

Whereas, on the first day of August, 1918, the United States of America entered into contracts for the construction of nineteen barges suitable to use for the transportation of said iron ore and coal; and

Whereas the United States of America is about to construct by contract or otherwise a fleet of towboats for the purpose of towing the said barges, the construction of which in the opinion of the Secretary of War is necessary to enable the government to dispose of the said barges more advantageously; and

Whereas the said fleet of towboats and barges is especially designed for and adapted to the transportation of iron ore and coal; and

Whereas the said lessee has entered into various engagements and undertakings to increase the pig iron supply as a war measure, which may have created, and according to the contention of the lessee did create, obligations on the part of the United States to the said lessee, but which he entirely releases and discharges in part consideration of this lease, which engagements, undertakings, and lease are in furtherance of the original design for the assembling of coal and iron ore at St. Louis, Missouri, and for the increase of pig iron facilities:

Now, therefore, the said lessor doth hereby charter and lease unto the said lessee for a term of five (5) years, beginning with the date of delivery to the lessee of the first barge or towboat and terminating five (5) years after the delivery of the first barge or towboat the following-described property, viz:

Nineteen barges which are being constructed under contracts dated August 1, 1918, with the Marietta Manufacturing Company, of Point Pleasant, W. Va., the Dravo Contracting Company, of Pittsburgh, Pa., and the Dubuque Boat & Boiler Works, of Dubuque, Ia., and three or four towboats about to be constructed and described in accordance with specifications prepared or to be prepared therefor.

It is thereupon covenanted and agreed between the said parties as follows:

2. (a) That the said lessee shall operate as a common carrier the said fleet of three or four towboats and
8 nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal, and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made provided the *Secretary of War* consents to such use other than as a common carrier.

(b) That the lessee shall pay all operating expenses of the fleet and maintain, during the continuance of the lease, each towboat and barge of the fleet in good operating condition to the *satisfaction of the lessor*; and shall hold the

United States entirely free from all liabilities and indebtedness of every kind in connection with the operation, care, and maintenance of the entire fleet and all its engines, boilers, outfit, tackle, apparel, furniture, and appurtenances; and the lessee shall, without unnecessary delay, as soon as he acquires any knowledge thereof, discharge any and all maritime liens that may at any time during the continuance of this lease from any cause arise against or become impressed upon any one, any or all of the fleet of nineteen barges and three or four towboats. The lessee shall procure and take out for the benefit of the United States, insurance, both fire and marine, in such an amount as in the judgment of the *Secretary of War* each of the vessels may require and with such underwriters or in such companies as are approved by the lessor, insuring each and every one of the barges and towboats against physical injury to them, or any of them, and against the loss of any or all of the

9 barges and towboats hereby leased. The lessee shall likewise procure and take out fire, marine and towers liability insurance in such an amount as in the judgment of the *Secretary of War* each of the vessels may require with such underwriters or in such companies as shall be approved by the lessor, and for the benefit of the United States, insuring each of the vessels against such injury as may be inflicted by such vessel upon other property, such as might result in maritime liens, or in liability or obligation by the lessor, and, if the lessor shall require, execute and deliver to the lessor, a bond in the penal sum of Three Hundred Thousand (\$300,000) Dollars, conditioned to protect the United States against such liability or obligation and against any and all maritime or other liens against the fleet or any of the vessels of the fleet and against any and all depreciation in value of all or any of said vessels, by reason of maritime or other liens arising or becoming impressed upon them or any of them. Such bonds as in any part of this contract are required to be given by the lessee for the benefit of the United States shall always and at all times during the continuance of this lease be kept good and shall be replaced at any time by other good and sufficient bonds at the request of the lessor, and they shall be kept good not only against the impaired creditor or financial responsibility of the obligor or surety, but also against partial depletion or entire exhaustion thereof brought about by the payment of losses or indemnities thereunder.

(b-1) All salvage earned, to which any of the said fleet shall become entitled, shall be for the benefit of the *United*

States, after deducting all expenses incident thereto and the proportion due to the master, officers, and crew.

10 (c) For the protection of persons furnishing materials, services, and labor in connection with the operation, furnishing, repair, care, and maintenance of the said towboats and barges, the lessee shall furnish to the lessor and continue in effect during the period of the lease, and in case of sale until title passes to the purchaser, a good and sufficient bond, approved by the lessor, in the penal sum of two hundred thousand (\$200,000) dollars.

3. The net earnings above operating expenses and maintenance for each and every ton of cargo moved and all other net earnings shall be turned over by the lessee to the *Secretary of War* as soon as practicable after each proper determination of the amount thereof, but at least every ninety days, for deposit with the Treasurer of the United States to the credit of the Secretary of War in a special deposit account, and shall continue so to be turned over to him and so deposited by him until such time as said net earnings shall equal the full amount of the cost of the several vessels of the fleet plus interest on said cost at 4 per cent per annum computed from the respective dates of delivery of the several vessels of the fleet, and that thereafter all net earnings over and above the full amount of the said cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum, shall be deposited to the credit of the *Secretary of War* at least every ninety days by the lessee in one or more national banks in St. Louis, Missouri, to be designated by the lessor, to be held for the fulfillment of the terms of this lease, provided that earnings derived from the transportation of commodities in barges hereby leased, moved by towboats not furnished by the United States, shall,

11 until all vessels of the Government fleet are delivered to the lessee, be subject to deduction of cost of the hire of the necessary towboats to move said barges, in addition to any other operating expenses and maintenance in connection therewith.

The lessee shall keep accurate detailed accounts of all tonnage moved and of all moneys received and due and of all items of operating costs, and his accounts shall at all times be subject to inspection by the lessor or his representatives. The overhead expenses included in operating costs shall be subject to the *approval of the lessor*, and any items not approved by him and to which the lessee may

object or take exception shall be referred to the *Secretary of War*, whose decision shall be final.

4. The approved national banks shall be required to furnish good and sufficient bonds, approved by *the lessor*, in penal sum in amounts at least equal to the sum deposited conditioned for the safety of the funds held on deposit, as provided in this lease, said bonds to be delivered to the custody of *the lessor* and to be maintained during the period of the deposit. The said banks shall credit to the account interest at the local prevailing rates of nonchecking accounts.

5. Within three months prior to the expiration of the lease, or of any period of renewal, or sooner if so desired by the lessee, a board of three persons shall be appointed, one to be designated by *the lessor*, one by the lessee, and one by the said two members, unless they shall fail to agree, in which case the third member shall be appointed by the *Secretary of War*, all of whom shall be familiar with the construction and cost of river vessels of steel and with the current market values thereof, to appraise the value of the said fleet at that time, and the said lessee shall be
12 given the option of purchasing the fleet upon the following terms:

(a) If the funds turned over to the Secretary of War and deposited by him with the Treasurer of the United States, under section 3 of this lease, shall aggregate a sum equal to the full amount of the cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum as aforesaid, then in case of the exercise of said option by the lessee said funds shall be applied to payment in full for the fleet, and any net earnings over and above the amount required for such payment on deposit in said bank or banks, provided in section 3 of the lease, or otherwise held on deposit, shall be paid to the lessee.

(b) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, under section 3 of this lease, shall be less than the full amount of the cost, plus accrued interest at the rate of 4 per cent per annum on such cost, but greater than the appraised value, the funds shall in said event be applied to payment of the fleet at the appraised value, and any amount in excess of the appraised value shall be retained by the Secretary of War for the use and benefit of the United States; and the fleet shall thereupon become the property of the lessee.

(c) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, as provided by section 3 of this lease, shall be less than the appraised value, then in the event aforesaid such funds shall be applied to the payment of the fleet so far as they shall reach, and the lessee shall pay in addition thereto, in the manner specified in section 6 hereof, the amount

13 whereby the aggregate funds so turned over to the Secretary of War fall short of the said appraised value.

6. It is further covenanted and agreed that the method of payment of any amount which the purchaser shall be required to pay, and not provided for out of the sums deposited to the credit of the Secretary of War, shall be as follows:


There shall be sixteen (16) payments. The first shall consist of all moneys on deposit to the credit of the Secretary of War, as indicated above, and shall be so applied at the date of the sale. The lessee shall execute for the balance fifteen (15) promissory notes, in equal amount, payable at the expiration of one year, two years, three years, etc., from date of sale with interest at 4 per cent per annum. Title to the property shall remain in the *United States* until the payment of the whole of the purchase price of said property.

7. It is understood and agreed that the lessee assumes full responsibility for the safety of his employees, plant, and materials, and the said nineteen barges and three or four towboats, and for any damage or injury done by or to them and from any source or cause in the operation of the fleet.

8. The *lessor* reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; and noncompliance, in *his judgment*, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the

14 credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels.

9. In the performance of the conditions of this lease, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of



the several States, Territories, or municipalities having criminal jurisdiction is prohibited.

10. No member or delegate to Congress, or resident commissioner, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom; but under the provisions of section 116 of the Act of Congress approved March 4, 1909 (35 Stats. 1109), this stipulation, so far as it relates to members of or delegates to Congress or resident commissioners, shall not extend or be construed to extend to any contract made with an incorporated company for its general benefit.

In witness whereof the parties aforesaid have hereunto placed their signatures of the date first hereinbefore written.

Witnesses:

JOHN STEWART,

Lt. Col. of Engineers,

as to

WILLIAM M. BLACK, [Seal.]

Major General, Chief of Engineers,

U. S. Army (First Party).

_____,
Lt. Col., Engrs.,

as to

EDWARD F. GOLTRA, [Seal.]

(Second Party).

15 The insertion of the words "three or" in the thirteenth and nineteenth lines of page 2, the seventh line of page 3, and the fifteenth line of page 7 are correct and were made before the contract was completed.

WILLIAM M. BLACK,

Maj. Gen., Chief of Engr.,

First Party.

EDWARD F. GOLTRA,

Second Party.

It is further understood and agreed between the said William M. Black, Chief Engineers, United States Army, and Edward F. Goltra, parties of the first part and of the second part, respectively, of the above contract, that the number of towboats to be supplied under the above contract, denominated "three or four" therein, shall be at least three,

and that a fourth shall be supplied only in the event that four suitable towboats of the general type and power described in the request for proposals now being canvassed for Four towboats for the upper Mississippi River can be obtained with the funds available as specified in the second whereas of the above contract, and not otherwise.

WILLIAM M. BLACK.

Witness:

JOHN STEWART,
Lt. Col. of Engineers.

EDWARD F. GOLTRA.

Witness:

JAMES M. HOFFMAN,
Capt., Engrs., U. S. A.

16

III.

Plaintiff further avers and shows to the Court that after the execution of the foregoing contract, to wit, on the 28th day of May, 1919, the plaintiff began his preparations for carrying out the terms of said contract if and whenever the said towboats and barges called for by said contract should be delivered to him in conformity with the terms and conditions of said contract. But the conditions relating to the subject matter of said contract were such and so difficult and so impossible of completion by the plaintiff on his part unless and until the Government should put the plaintiff in a position to undertake and complete the practical execution of said contract by providing the towboats and barges and other facilities called for in said contract to be provided by the United States to the plaintiff. And thereupon and thereafter further negotiations were entered into with reference to the subject matter of said contract wherein and whereby the United States, as represented by its proper officials thereunto duly authorized, informed the plaintiff that it was advantageous and in the best interest of the United States to modify the said contract for the following reasons: "To more fully provide for the operation of said barges and towboats as a common carrier by providing unloading facilities at St. Louis, Mo., by the use of funds remaining from the allotment of \$3,860,000 from the United States Shipping Board Emergency Fleet Corporation, and to provide for the sale of the said unloading facilities to the lessee under certain conditions."

And thereupon and thereafter the plaintiff herein, Edward F. Goltra, set about the providing of the necessary

17 tract of land and runway on which the unloading facilities, mentioned in said supplemental contract of May 27th, 1921, were to be erected and proceeded with the construction of said runway and other equipment, appurtenances, and appliances connected therewith and completed the same in manner and form as provided and required by said supplemental contract. And the plaintiff avers and shows to the Court that the plaintiff in all things complied with all the terms of the said two contracts, viz, the contract dated May 28th, 1919, and the supplemental contract dated May 27th, 1921. And the plaintiff avers that he has complied with every demand or requirement made of him by either the Secretary of War or Chief of Engineers of the United States named as lessor in the said contracts. And the plaintiff avers that his said compliance with the terms of the said contract as aforesaid was in the face of most unjust interference and restrictions interposed by the defendants herein and other persons representing the said defendants and the Government of the United States in that behalf, as will be more fully hereinafter set forth.

The said supplemental contract is in words and figures as follows, to wit:

Whereas, on the twenty-eighth day of May, 1919, a contract was entered into between Major General W. M. Black, Chief of Engineers, U. S. Army, who, as well as his legally appointed successor, is hereinafter designated as the lessor representing the United States of America, of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, his heirs, executors, administrators, or assigns, hereinafter designated as the lessee, of the second part, for chartering and leasing unto the lessee for a term of
18 five years, subject to renewals, nineteen (19) barges and four (4) towboats belonging to the United States.

And whereas it is found advantageous and in the best interest of the United States to modify the said contract as hereinafter specified for the following reasons:

To more fully provide for the operation of the said barges and towboats as a common carrier by providing unloading facilities at St. Louis, Mo., by the use of funds remaining from the allotment of \$3,860,000 from the United States Shipping Board Emergency Fleet Corporation, and to provide for the sale of the said unloading facilities to the lessee under certain conditions:

Now, therefore, the said contract is, by this Supplemental Agreement between Major General Lansing H. Beach, Chief of Engineers, U. S. Army, and the said contractor, on this 26th day of May, 1921, hereby modified in the following particulars, but in no others:

The lessee will, at his own expense, within eight (8) months from the date hereof, provide the necessary tract of land and runway on which the said unloading facilities are to be erected, stand, and operate, said tract to be selected by the lessor, subject to approval by the lessee, and said runway to be built according to plans submitted by lessee and approved by the lessor.

The lessor will erect on the said tract of land an unloading apparatus or facilities of a kind and character mutually agreed to by lessor and lessee as sufficient and adequate to handle the cargoes to be transported by the said barges and towboats.

19 The said lessee shall, at his expense, maintain and operate the said unloading facilities in connection with the barges and towboats as a common carrier, subject to such charges for services of loading and unloading as may be approved by the Secretary of War.

The said lessee shall take out and maintain for the benefit of the United States insurance in such amount and with such companies as may be approved by the lessor.

The terms of the original lease as to net earnings (paragraph 3), appraisement, and option to purchase, and conditions of purchase (paragraph 5), method of payment in the event of purchase (paragraph 6), inspection (paragraph 8), shall govern so far as applicable and pertinent to the said unloading facilities.

In case the said lessee, his heirs, administrators, executors, or assigns, does not take over and pay for the said unloading facilities according to the foresaid terms, then and in that case the lessor may, without [lot] or hindrance by the said lessee, his heirs, administrators, executors, or assigns take said unloading facilities in the same manner as is provided in the original lease as to the barges and towboats, or

In case the lessor does not desire to remove the said unloading facilities under the preceding paragraph, the lessor shall have the right to lease the land and runways on which the unloading facilities stand, for five (5) years with the

privilege or renewals, the terms of such lease, if not mutually agreed to by the lessor and lessee, to be fixed by a board of three persons, one member to be selected by the lessor, one member by the lessee, and one member by agreement between the two aforesaid members.

20 This supplemental agreement shall be subject to the approval of the Secretary of War.

In witness whereof the parties aforesaid have hereunto placed their signatures at the time of execution of this agreement.

Witnesses:

P. J. DEMPSEY,
as to LANSING H. BEACH,
Major General, Chief of Engineers.

THOMAS M. ROBINS,
Major, Corps of Engineers,
as to EDWARD F. GOLTRA.

Approved May 27, 1921.

J. M. WAINWRIGHT,
Assistant Secretary of War.

Plaintiff further avers that towboats and barges mentioned and contemplated in the said contract and supplemental contract were in course of construction by the Government at the time of the execution of the said original contract dated May 28th, 1919, and were not completed until long after said date and were not delivered to the plaintiff until long after the execution, by the parties thereto, of the said supplemental contract dated May 27th, 1921, to wit, the 15th day of July, 1922, and the plaintiff avers that at the date of the delivery of the said towboats and barges to the plaintiff, to wit, on July 15th, 1922, the said towboats and barges were not in proper condition for delivery in that they were defective in parts and were not properly constructed for the uses and purposes for which the said towboats and barges were designed, and were not constructed and adapted for the uses and purposes which were in contemplation of the parties at the time of the execution

21 of said two contracts, dated respectively, May 28th, 1919, and May 27th, 1921. The plaintiff avers that such and so many were the defects, as aforesaid, that numerous and varied repairs were necessary to be made in order to complete the said towboats and barges and to put them in the proper condition for the service for which they were

designed by the parties to said contracts and such condition as was necessary for their operation. And plaintiff avers that it was necessary to make and the plaintiff did make, at his own cost and expense exceeding the sum of \$10,000 per boat, the repairs thus made necessary for the operation of said boats.

IV.

The plaintiff further avers and respectfully shows to the Court that at the time of the execution of the original contract herein, dated May 28th, 1919, and at all times prior thereto after the signing of the Armistice in the World War, to wit, November 11th, 1918, the sudden change of conditions from war to peace presented many and varied difficulties both Governmental and personal to the parties to the said contracts hereinbefore set forth, and especially in this, to wit, by mutual agreement between the plaintiff and the representatives of the United States as set forth earlier in this bill the undertakings by the parties hereto contemplated the expenditure of huge sums of money for the purposes intended, to wit, by the plaintiff, on the one hand, to supply plants, iron ore, and coal for the production of pig iron and other commodities necessary for the manufacture of munitions of war and by the Government, on the other hand, in the purchase and transportation of such products.

And plaintiff further avers that prior to the making of said contracts the attempts by the Government and others to carry freight by towboats and barges on the Mississippi River had been unsuccessful in that the towboats and barges had been run at a financial loss. And plaintiff avers that the plaintiff had been for a long time prior thereto familiar with the uses and attempted development of boats and barges on the Mississippi River and was peculiarly qualified to put forward and complete the plans in contemplation by the parties to said contracts at the time of executing said contracts; and the knowledge and experience of the said plaintiff was well known to the representatives of the Government who participated in said several negotiations and contracts and was taken into consideration in the making of said two contracts dated May 28th, 1919, and May 27th, 1921.

But the plaintiff avers that at the time of making said contracts it was well understood and known to the representatives of the Government that the plans and purposes therein contemplated were of necessity experimental in kind

and required time in their development because of previous ineffective efforts to use the Mississippi River for similar purposes and because of the absence of current freight traffic of merchants and shippers on steamboats running upon the Mississippi River and the absence of public use and confidence in freight traffic on the Mississippi River. And said conditions were taken into consideration by the representatives of the Government in the making of said contracts. But, nevertheless, plaintiff avers that after the

23 time of making said contracts the plaintiff had secured divers and sundry contracts and agreements for the shipment of commodities of different kinds on the said barges, including hundreds of thousands of barrels of oil from New Orleans to Roxana, Illinois, coal from Kentucky to St. Louis up to 2,000 tons a day, manganese from New Orleans to St. Louis, and plaintiff had contracts or oral promises for shipment of various other commodities.

Plaintiff further avers that it is provided by Section 2a of the said contract of May 28th, 1919, as follows:

“2. (a) That the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal, and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made provided the Secretary of War consents to such use other than as a common carrier.”

Plaintiff avers that in and by said contract as set forth in said Section 2 (a) in connection with other provisions of the said contract the plaintiff was required to operate as a common carrier the said fleet of towboats and barges upon the Mississippi River and its tributaries in the transportation of iron ore, coal, and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the

24 prevailing rail tariffs without the consent of the Secretary of War, and at the same time under said section of said contract it was provided that the plaintiff was to be permitted to make the most profitable and advantageous use of the said vessels as possible but subject, however, to the right of the Secretary of War to determine what use might be made by the plaintiff of said vessels otherwise than as a common carrier.

Plaintiff further avers that the rate which plaintiff arranged with the proposed shippers of grains, oil, coal, manganese ore, and other commodities was based upon eighty per cent (80%) of whatever the prevailing rail rate was at the time of shipment. And plaintiff avers that when said rates were submitted to the Secretary of War for his consideration such proceedings were had by negotiation, discussion, and correspondence between the Secretary of War or his representatives and this plaintiff that permission could not be obtained by the plaintiff from the Secretary of War to transport some of said commodities, and as to other commodities, notably grain, such conditions were imposed as required the plaintiff before contracting or receiving for transportation the articles to be transported without obtaining first the consent from time to time of the Federal Manager in charge of the Mississippi-Warrior River Service, a Government officer, or his representative in St. Louis, as to the amount of grain or such commodity which the plaintiff would be permitted to receive for transportation on said barges mentioned in said contract.

And the plaintiff further avers that by reason of such rulings and directions from the Secretary of War and by reason of the vagueness and indefiniteness of the right and authority granted to the plaintiff as to transportation
25 and rates of freight the plaintiff was placed in a position where it was impossible in law for him to operate as a common carrier and thereby receive from all persons offering freight of specific kinds under similar conditions and to publish rates with the Interstate Commerce Commission as to his freight rates without making himself liable in damages to persons who should offer freight of the kinds described for transportation on the boats of the plaintiff except by the limitation of obtaining the consent of the Government official for the transportation of the specific freight offered. And the reasons assigned by the Secretary of War and the representatives of the United States for this action in so refusing the plaintiff permission to act as a common carrier as aforesaid was that if such permission was granted the plaintiff, a citizen of Missouri and of the United States, who was required by the said contracts to be a common carrier, would be in competition with the Government of the United States in operating boats and barges under what is known and designated by the Government as the Mississippi-Warrior Service. The plaintiff avers that the said Secretary of War in divers and sundry other ways failed on behalf of the Government to make provision

whereby the plaintiff under said contract could operate as a common carrier as required by Section 2a of said original contract of May 28th, 1919, or could act as a private carrier in the alternative or act otherwise in such a way as would enable the plaintiff to make the most profitable and most advantageous use of said vessels in any way other than as a common carrier as is provided in the alternative in said

26 Section 2a of said original contract. And the plaintiff therefore avers that by the acts of the said John W.

Weeks, acting as Secretary of War, and other representatives of the War Department, the plaintiff was wrongfully deprived by the lessor in said contracts from carrying out the terms and conditions of the said contracts as a common carrier or as a private carrier or in any other manner provided by said contracts; and it became and was and is impossible for the plaintiff to so carry out the contracts under the terms and conditions thereof, unless and until the lessor therein, *being the United States*, causes and permits the plaintiff to carry out the conditions of said contracts in manner and form and for the purposes contemplated by said contracts and for the mutual benefit and advantage of the United States and of this plaintiff.

V.

The plaintiff further avers and shows to the court that said contract of May 28th, 1919, and said supplemental contract of May 27th, 1921, constitute in law a contract of charter and lease to the plaintiff for a term of five years of the said towboats and barges mentioned therein and also a contract of privilege and option in the plaintiff to purchase the same on the terms and conditions therein stated, together with the unloading facilities mentioned and described in said supplemental contract. And said contracts established in the plaintiff, by virtue of their terms and conditions and of the considerations moving the plaintiff and the United States thereunto, a fixed and definite property right in said towboats and barges and in said unloading facilities and in the land on which said unloading facilities were constructed, of which rights, respectively, the plaintiff could

27 not be lawfully deprived, except by a proceeding in Equity for an accounting and a determination by a decree of Court of the lawful interest of each of the parties thereto in the subject matter of said contracts. And the plaintiff avers that notwithstanding such rights in the plaintiff, the defendant, John W. Weeks, purporting to act as Secretary of War of the United States, and the defend-

ants, Colonel T. Q. Ashburn, purporting to act as Chief of Inland and Coastwise Service, and the defendant, James E. Carroll, purporting to act as United States District Attorney for the Eastern Division of Missouri, acting each for himself and in combination one with another, on or about the 3rd day of March, 1923, and thereafter did wrongfully and unlawfully undertake to declare said contracts terminated and did demand from the plaintiff the immediate possession of the said boats without warrant of law and did wrongfully and unlawfully and arbitrarily threaten to take by force the said towboats and barges and unloading facilities described in said two contracts and did cause to be begun the actual seize of some of said towboats and barges by persons pretending and purporting to represent the United States and acting under instructions of the said defendants herein. Each and all of which unlawful acts the said defendants are now threatening to repeat, unless said towboats, barges, and unloading facilities are surrendered and delivered to them by the plaintiff voluntarily and at once. And plaintiff avers that the said defendants will in fact wrongfully and unlawfully and arbitrarily seize and take away from the plaintiff the said property to the irreparable injury of the plaintiff, unless restrained and enjoined therefrom by this Honorable Court.

28 And plaintiff avers that he has no adequate remedy at law for the redress of the wrongs herein complained of. And plaintiff further avers that in furtherance of their said wrongful acts as aforesaid, the said defendant, John W. Weeks, purporting to act as Secretary of War of the United States, on the 4th day of March, 1923, said day being Sunday, caused the defendant, Colonel T. Q. Ashburn, purporting to act as Chief of Inland and Coastwise Service of the United States, under the instructions of said defendant Weeks, to deliver to the plaintiff a communication which is in words and figures as follows, to wit:

War Department,
Washington, March 3, 1923.

E. F. Goltra, Esq.,

La Salle Building, St. Louis, Missouri.

Sir: Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judg-

ment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier and in other particulars.

I therefore declare the said contract and the supplement thereto terminated. You are hereby directed upon the receipt of this notice immediately to deliver possession of the said towboats and barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States, to Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service, who will deliver this notice, and who is instructed and authorized to receive and receipt for the property herein mentioned.

Yours very truly,

JOHN W. WEEKS,
Secretary of War.

And at said time said defendant, John W. Weeks, gave to defendant, Colonel T. Q. Ashburn, instructions in writing as follows:

War Department,
Washington, March 3, [1922.]

Memorandum for Colonel Ashburn:

My instructions in reference to the cancellation of the Goltra contract are that you proceed to St. Louis, Missouri, and deliver to Edward F. Goltra in person the notice herewith inclosed of the termination of his contract and the supplement thereto and make demand on him for the return of possession of said property to you as the agent of the United States, giving to him proper receipts for all of said property so delivered to you.

In the event of his failure or refusal to make delivery of the property demanded, you will apply to the United States District Attorney at St. Louis, requesting the institution of legal proceedings for the recovery of said property.

JOHN W. WEEKS,
Secretary of War.

which said communication from defendant Weeks to the plaintiff was handed to the plaintiff by said Colonel Ashburn in Washington, D. C., on Sunday, the 4th day of March, 1923.

But plaintiff avers that no notice or opportunity for a hearing as to his rights, either before the Secretary

30 of War or before any Court, had been served or sent to the plaintiff prior to said notice, dated March 3, 1923, of the termination of said contracts.

Plaintiff avers that on the 8th day of March, 1923, the plaintiff caused to be sent to the said John W. Weeks, as Secretary of War, a communication in reply as follows:

March 8, 1923.

To the honorable the Secretary of War,

Washington, D. C.

Sir: On Sunday, March 4, 1923, there was served upon me by Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service, your letter of March 3, 1923, stating that in your judgment I had not complied with the terms and conditions of my contract with the Government dated May 28th, 1919, in that I had failed to operate the towboats and barges specified in said contract as a common carrier, and in other particulars; that therefore you declared said contract terminated and directed me to immediately deliver possession of said towboats and barges and unloading facilities erected pursuant to a supplemental contract, to said Colonel T. Q. Ashburn.

This notice was served upon me while I was in Washington on other business and without any previous intimation that any step of this kind was contemplated, and I was informed by Colonel Ashburn that I must give an answer to this notice by six o'clock to-day.

The abruptness of the action attempted to be taken, and the very brief opportunity allowed for any answer on my part, necessarily requires that my reply be brief.

Most respectfully, I decline to comply with your demand.

To do so would deprive me, without any notice whatever, or opportunity to be heard, of rights and property lawfully acquired at a very large expenditure by me of time and money. I have, in fact, of most unjust interference and restrictions fully complied with all of the terms of my contract, and, further, I have complied with every demand or requirement made of me by either you or the Chief of Engineers of the United States, the lessor named in my contract.

The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has in fact no substantial basis on which to rest. This I believe will be fully demonstrated to you if I am granted a fair and

impartial hearing to which, as a citizen, I am entitled, and which, in fairness and justice, I now request.

Very respectfully yours,

EDWARD F. GOLTRA.

Plaintiff avers that following the delivery of said communications, to wit, after the 8th day of March, 1923, the said three defendants made the threats of seizure vi et arms aforesaid, and caused said seizure to be attempted and begun.

Plaintiff further avers that the United States, acting through its lawfully authorized representatives, has not at any time fulfilled the said two contracts of May 28, 1919, and May 27, 1921, by putting the plaintiff into a position or allowing him to take a position where he could carry out the conditions of said contracts, either as a common carrier or as a private carrier under said contract as defined in Section 2 (a) of the original contract of May 28, 1919. But, on the contrary, the said defendant, John W. Weeks, acting therein as Secretary of War, as aforesaid, has arbitrarily, wrongfully, and without authority of law prevented the plaintiff from using his boats and barges and unloading facilities as a common carrier, and has, on the other hand, prevented the plaintiff from other uses provided in said contract, as private carrier or otherwise, by rulings of said defendant and as Secretary of War, which made it impossible for the plaintiff to comply with said provisions of the said contracts. All of which conduct by said defendant, John W. Weeks, is and was beyond his authority as Secretary of War; was a usurpation and abuse of power; was in derogation of the rights of the plaintiff in law; was arbitrary, unreasonable, unjust, and against equity and good conscience. And the plaintiff avers that the acts of the defendant, John W. Weeks, and of the other defendants herein, as set forth in this bill in equity, are in violation of Amendment V to the Constitution of the United States in that they are seeking to deprive and are about to deprive the plaintiff of his property without due process of law.

Plaintiff further avers that the said defendants and each and every of them unlawfully combining and conspiring to deprive the plaintiff of his property without due process of law, as aforesaid, have already committed overt acts in pursuance of their said unlawful purpose in this, to wit: That on the 25th day of March, 1923, the same being Sunday,

the said defendants, by their agents and servants, vit et armis, and with a great force of men acting with and for them, unlawfully and violently, and against the protests of the plaintiff, took forcible possession of a portion of said towboats and barges, described in said contracts, and then lying at the river bank within said City of St. Louis, and within said Eastern Division of the Eastern District
33 of Missouri, and caused them to be hauled away from said bank by a towboat and removed from the City of St. Louis, and thus unlawfully took the same from the possession of plaintiff, but plaintiff avers on information and belief that said towboats and barges, so forcibly and unlawfully removed, are still within the jurisdiction of the District Court of the United States for the Eastern Division of Missouri.

And plaintiff further avers that at the time this bill is in course of preparation and presentation to the Judge of said United States District Court, to wit, on the afternoon of Sunday, March 25th, 1923, the said defendants have been proceeding unlawfully and forcibly with a large number of men, as aforesaid, to take away from the possession of plaintiff and to remove and cause to be removed from their said position at the river bank in St. Louis, all of the remaining towboats and barges mentioned in said contract which have not heretofore been unlawfully taken and removed; and the defendants are now still proceeding and threatening to forcibly remove all of the towboats, barges, and other facilities for transportation mentioned in said contracts; and the said defendants will unlawfully deprive the plaintiff of all of his rights at law and in equity under said contracts, to the irreparable injury and damage of plaintiff, unless enjoined and restrained by this Honorable Court.

Wherefore, Plaintiff prays for a temporary restraining order, to be granted immediately and without further notice to the said defendants, enjoining them from interfering with the possession of plaintiff of said boats and barges, requiring and enjoining and commanding them to re-
34 turn and cause to be returned to the possession of the plaintiff immediately at the place or places from which said towboats and barges and other facilities for transportation were taken and removed, all and singular, the said towboats, barges, and other facilities and appliances, pending the further orders of this court, and enjoining the said defendants and each of them, their assistants, inferior officers, agents, servants, and all persons acting by,

through, or under them in the doing any of the acts connected with the said taking of possession and removal of said towboats, barges, and other facilities for transportation; and further enjoining and commanding them to restore in all respects the status quo ante, as of the time before any attempt to take possession as aforesaid was attempted, and enjoining them to maintain such status quo pending the further orders of this Court.

And Plaintiff further prays that an order be made upon the said defendants, and each of them, requiring them, and each of them, to show cause on a day to be named therein pursuant to the Equity Rules why a temporary injunction should not be entered against them, and each of them, enjoining and restraining each and every and all of them from doing any of the acts herein made the subject of complaint until the full hearing of the cause herein, and especially enjoining and restraining until the further order of the Court the said John W. Weeks, purporting to act as Secretary of War of the United States, from doing any act whatsoever looking to the cancellation or other termination of the said Contract of May 28, 1919, and said supplemental contract of May 27, 1921, between the United States and said Plaintiff; and especially enjoining and restraining until the

35 further orders of the Court, the said Colonel T. Q. Ashburn, purporting to act as Chief of Inland and Coastwise Waterways Service of the United States, from doing any act whatsoever in aid of the declared purpose of said defendant John W. Weeks to terminate the said contracts, and enjoining and restraining him from further interfering in any way with the possession by plaintiff of said boats and barges; and especially enjoining said James M. Carroll, purporting to act as District Attorney of the United States, from doing any act or thing in furtherance of the plans of the said defendant, John W. Weeks, to terminate said contracts, or to interfere with the possession by plaintiff of said boats and barges and facilities of transportation.

And the plaintiff prays that on final hearing of this cause of action a decree may be entered in favor of the plaintiff and against the defendants, and each of them, which shall determine the rights of plaintiff as set forth herein under said contracts, and perpetually enjoin and restrain the said defendants from interfering in any way with said rights.

And may it please your Honors to grant unto your orators a writ of subpoena, issuing out of and under the seal of this

Honorable Court, to be directed to the said John W. Weeks, Secretary of War; Colonel T. Q. Ashburn, Chief of Inland Waterways and Coastwise Service; and James M. Carroll, District Attorney of the United States for the Eastern District of Missouri, commanding them and each of them, on a certain day and under a certain penalty, in the said writ to be inserted, personally to be and appear before your honors in this honorable Court, and then and there full, true, and perfect answer make to all and singular the
 36 premises, and further, to stand, to perform, and abide such further orders, direction, and decree therein, as to your honors shall seem meet and shall be agreeable to equity and good conscience.

And plaintiff prays that he may have such other and further relief as the nature and circumstances of the case may require, and as to this Court shall seem just and equitable.

EDWARD F. GOLTRA,

Plaintiff.

By JOS. T. DAVIS,

CHAS. CLAFLIN ALLEN,

DOUGLAS W. ROBERT,

His Solicitors.

PALMER, DAVIS & SCOTT,

Of Counsel.

United States of America,
 Eastern District of Missouri, ss:

Douglas W. Robert, being duly sworn, deposes and says that he is one of the solicitors for the plaintiff in the above-entitled cause, and is familiar with the foregoing bill of complaint, and knows the contents thereof; that the same is true to the knowledge of deponent except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

DOUGLAS W. ROBERT.

Subscribed and sworn to before me this twenty-fifth day of March, 1923.

My term expires Nov. 17th, 1926.

(Seal.)

W. J. ROBINSON,
 Notary Public.

57 Temporary Restraining Order and Order to
 Show Cause.

(Filed March 25, 1923.)

Now, on this day, the plaintiff presents his complaint, duly verified by affidavit, to Honorable Charles B. Faris, Judge of the United States District Court of the Eastern Division of the Eastern Judicial District of Missouri, in vacation praying an injunction restraining the defendants, Honorable John W. Weeks, Secretary of War of the United States, Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States and James E. Carroll, United States District Attorney their agents and servants and anyone acting by or through or for them, from taking possession of and in any wise interfering with four power boats and nineteen barges, now in the possession of the complainant, and restraining the said defendants, their agents and servants and anyone acting by, through or for them, from taking possession of or interfering with the said boats and barges and a mandatory injunction compelling the said defendants to restore to plaintiff all said boats and barges of which they have already taken possession and it appearing from said complaint, that the defendants, their agents and servants, have taken possession of said boats and one barge, and have now the same on the Mississippi River, within the jurisdiction of this Court, and it further appearing from said complaint that the defendants, their agents and servants, are now endeavoring to take the remaining eighteen barges from the possession of the complainant, and to convey the same without the jurisdiction of this Court, and will so do unless restrained by order of this Court, and

It further appearing from the complaint that the plaintiff is in possession of said boats and barges under a contract with the Government of the United States, and if said boats and barges are taken from his possession by the defendants he will be deprived of his property without
38 due process of law, in violation of the Constitution of the United States and that he has no adequate remedy at law and,

It further appearing from the complaint that said acts of the defendants, their agents and servants, occurred on Sunday, March 25th, 1923, on a day in which this Court is not in session, and if the defendants are not this day restrained from taking said boats and barges they will convey them beyond the jurisdiction of this Court, before the Court can be convened, it is therefore,

Ordered, that upon the plaintiff giving a penal bond in the sum of \$1000. that the defendants, John W. Weeks, Secretary of War of the United States, Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways service of the United States, and James E. Carroll, United States District Attorney, their assistants, inferior officers, agents, servants and all persons acting by, through, for or under them, be and they are hereby restrained from interfering with the possession of the plaintiff of said boats and barges and from taking any of them from his possession and they are and each of said defendants, their assistants, inferior officers, agents, servants and all persons acting by, through for or under them, are further

Ordered to restore to the possession of the plaintiff all of said boats and barges, the possession of which they have already taken.

It Is Further Ordered that said defendants show cause in the United States District Court of the Eastern Division of the Eastern Judicial District of Missouri, on the 27th day of March, 1923, why a temporary injunction should not issue further restraining the defendants from doing said acts until the further order of said Court.

Given under my hand this March 25th, 1923.

(Signed) C. B. FARIS.

Judge of said Court.

39

Saint Louis,

Marshal's Return.

United States of America,	}	ss.
Eastern Division of the		
Eastern Judicial District		
of Missouri.		

I do hereby certify that on the 27th day of March A. D., 1923, at about twelve minutes after four o'clock in the afternoon of said day, at a place on the west side of the Mississippi River, approximately two hundred feet east of the west bank of the said Mississippi River, on said river, at a place about three to five miles north of the city of Cape Girardeau, Missouri, I executed the within writ by serving the same on the within named defendant, Colonel T. Q. Ashburn, who was at the time of said service in the pilot room of the tow boat called "Vicksburg", by delivering a certified copy of said writ together with a certified copy of the

Bill of Complaint, as furnished to me by the Clerk of this Court, to the within named Colonel T. Q. Ashburn, personally.

JOHN E. LYNCH,
United States Marshal,
By (Sgd) O. A. KNEHAUS

Saint Louis,

Marshal's Return.

United States of America,
Eastern Division of the
Eastern Judicial District
of Missouri. } ss.

I do hereby certify that on the 26th day of March 1923, about one and one half miles North of Ste Genevieve, Missouri, while the Steamer "Vicksburg" was tied on the Illinois bank of the Mississippi River, I executed the within writ by placing a true and correct copy thereof, as furnished by the Clerk of this Court, on the deck of the said steamer at the feet of the within named defendant Colonel T. Q. Ashburn.

JOHN E. LYNCH
United States Marshal

By (Sgd) JNO. L. KENNEDY
Deputy.

40 Return of Colonel T. Q. Ashburn to order to
show cause.

(Filed Apr. 14, 1923.)

Comes now defendant Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States, and, for his return to the order to show cause herein why a temporary injunction should not issue against him, states and shows to the court as follows, to wit:

That heretofore, while the United States of America was in a state of war with the Empire of Germany, and pursuant to the acts of Congress legally enacted, the President of the United States delegated to the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation the power and authority vested in him under certain laws establishing, enlarging, and maintaining the emergency shipping funds, the authority to enter into

41 contracts for the construction of nineteen (19) river

barges and of four (4) towboats intended for use on the Mississippi River and its tributaries, and the said Fleet Corporation, in pursuance to said authority, transferred to the Chief of Engineers, United States Army, the sum of Three Million Eight Hundred Sixty Thousand Dollars (\$3,860,000.00), for the purpose of paying for said towboats and barges, and that thereafter, pursuant to such authority, the said barges were constructed and paid for out of the funds so appropriated, and thereafter, by executive order of the President of the United States, duly authorized, the said President of the United States did, on March 12, 1919, withdraw from the United States Shipping Board Emergency Fleet Corporation such part of the power and authority vested in him under said laws with reference to said barges and towboats, and did by said executive order delegate to the Secretary of War the power and authority so withdrawn from said United States Shipping Board and United States Shipping Board Emergency Fleet Corporation, with power and authority to said Secretary of War to deal with said barges by contract or otherwise, with reference to the operation, management and disposition of the same as in his judgment should be most economical and advantageous to the United States of America.

That in pursuance to the authority so delegated the contract set forth in extenso in complainant's bill of complaint was entered into; that in the securing of the said contract the said Edward F. Goltra represented to the United States of America and its officers that he had entered into various engagements and undertakings to increase the pig-iron supply as a war measure, and that he was, and had been
42 for a long time, familiar with the uses and attempted development of the towboats and barges on the Mississippi River, and was peculiarly qualified to put forward and complete the plans of the Government of the United States with respect to the development of river traffic on the Mississippi River and its tributaries, and, in reliance upon said representations of said Edward F. Goltra, the said contract and the supplementary contract set forth in the complainant's bill of complaint were entered into.

That thereafter construction and completion of said barges and towboats continued, and, in the course of time, were ready for delivery to the said Edward F. Coltra, pursuant to the terms and provisions of said contracts; that thereafter, from time to time, the said Edward F. Coltra was requested by the United States of America and its officers to receive said towboats and barges and to put them into operation,

as was contemplated in the contracts aforesaid, and finally on June 30, 1922, the Secretary of War advised the complainant that he must take physical possession of the said fleet of towboats and barges on or before July 15, 1922, or the same would be delivered back to the Government of the United States. That it was not until the said 15th day of July, 1922, that the complainant did take possession of said barges and towboats, as he was required to do under said contracts.

That it is provided in the said contract of May 28, 1919, that complainant should "operate as a common carrier the said fleet of three or four towboats and nineteen barges on the Mississippi River and its tributaries for the period of the lease, and of any renewals thereof," the period of said contract or lease under its terms beginning with the
45 day of the delivery of the first of said towboats to said complainant, to wit, on the 15th day of July, 1922.

That notwithstanding the provisions of said contract that said complainant should operate said fleet of towboats and barges as a common carrier, he has made no effort so to do, and has not from the time he obtained possession of said towboats and barges acted or served the public as therein provided; that he has made no effort to comply with the Shipping and Merchant Marine Act of 1920 with regard to common carriers; that he has failed to comply with the Shipping Act regarding common carriers; that he has made no effort to file, and has filed, no schedule of joint rail and water rates with the Interstate Commerce Commission, and has made no effort whatsoever to make arrangements with the railroads or other common carriers to secure such rates; that he has created no organization for the purpose of operating said fleet of towboats and barges as a common carrier, and has failed to perform any service of transportation whatsoever, except in one or two instances under special arrangements with private parties, and that these movements were of slight consequence and extent, but that practically all of the time since the complainant has had possession of said fleet of towboats and barges the same have remained idle and out of service; that this defendant is informed and states, upon information and belief, that only one of the towboats, since it has been in the possession of complainant, has been under steam, and that only in connection with the one or two movements heretofore referred to.

That the object and purpose of the United States of America in entering into the contract with the com-

44 plainant was to have the said barges and towboats used in commerce and transportation upon the Mississippi River and its tributaries to demonstrate the practicability and economy of such service and encourage and stimulate the use of such waters, and that that purpose has entirely failed to be accomplished by reason of the failure of the said complainant to take any steps or to make any effort whatsoever looking to the utilization of said fleet in such commerce and transportation.

That numerous complaints have been made by individual citizens and organizations of citizens in various cities served by the Mississippi River and its tributaries with reference to the failure of said fleet to be used for the purposes of commerce and transportation upon said rivers; that this defendant states, upon information and belief, that there was and is great and constant need for the services of said fleet in connection with commerce and transportation along these waterways, and that they were ample opportunities open to the said complainant to have utilized said fleet for the purpose of transportation and commerce, but that he has utterly failed and neglected to avail himself of the opportunities so [afforded], and has neglected and failed to put himself in a position to act as a common carrier, as was contemplated in the contracts hereinbefore referred to.

That the United States of America has operated and now operates a barge line known as the Mississippi-Warrior Service in the lower Mississippi River and its tributaries, and that in such service it has had opportunity to make use of the barges and towboats delivered to the complainant under the contracts aforesaid, and, indeed, has had crying need for

45 the same in order to take care of the business of transportation and commerce available to it, and has offered to pay the complainant fair and reasonable compensation and rates for the use of said barges and towboats, in order that instead of lying idle they might be utilized for the purpose of transportation and commerce, but that said complainant has refused to make any arrangements, or to permit the use of said towboats and barges, or any of them, in connection with such service, notwithstanding the fact that he himself was making no use of the same.

That instead of caring for and conserving the said towboats and barges, as required by the contracts aforementioned, the complainant has neglected to care for and conserve the same, and has permitted some of the said towboats and barges to suffer from exposure to the elements, and to

be depreciated in value for service, and while not actually in service.

That in and by article 8 of said contract of May 28, 1919, it is provided that noncompliance with any of the terms or conditions of said contract would justify the termination of said contract and the returning of the fleet of barges and towboats to the United States, and that in pursuance to the terms and provisions of said contract, and of said article thereof, and because of the matters and things hereinbefore set forth, which the complainant neglected and failed to do, as he was obliged and bound to do under his contract aforesaid, the Secretary of War of the United States of America caused to be delivered to said complainant the notice dated March 3, 1923, set forth in subdivision 5 of the bill of complaint herein, wherein and whereby said contract was terminated in accordance with the provisions and stipulations of the contract itself, and demand made upon the said complainant for the return of the said towboats and barges to the representatives of the United States of America, as in said notice designated; that thereafter, on March 8, 1923, complainant responded to said demand by his communication of that date set forth in subdivision 5 of the bill of complaint herein, wherein he declined and refused to return said towboats and barges as demanded.

That thereafter, to wit, on the 25th day of March, 1923, in pursuance of authority delegated to him by the Secretary of War of the United States, and pursuant to the terms of said contract, particularly article 8 thereof, the defendant Col. T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States of America, an officer of the United States Army, acting under orders of the Secretary of War of the United States, took possession of the said fleet of towboats and barges on the Mississippi River, and, in so doing, acted entirely without force of any kind, in a peaceful and orderly manner, and without creating any disturbance or breach of the peace, and the United States now has full, complete, and actual possession of said towboats and barges, and has so had such possession since the 25th day of March, 1923.

That on the 25th day of March, 1923, complainant presented to the honorable judge of this court his verified bill of complaint which is now on file in this cause, and the honorable judge of this court, to whom said bill of complaint was presented, did thereupon make and enter of record an order in said cause enjoining the defendants from inter-

fering with the possession by the complainant of the said towboats and barges, and from taking any of them from the possession of the complainant, and requiring them to
47 restore to the possession of the complainant all of said towboats and barges of which possession had been taken.

That thereafter the honorable judge of this court entered a further order directing this defendant to return to the jurisdiction of this court, on or before the 21st day of April, 1923, said towboats and barges, or to show cause on said date why he should not be punished for contempt for failing so to do.

This defendant further states and shows to the court that in compliance with said order he has made arrangements and will cause the return of said towboats and barges into the jurisdiction of this court within the time provided in said last-named order.

This defendant further respectfully shows to the court that the order first herein entered enjoining him as an officer of the United States from taking possession of said towboats and barges, and that the suit set forth in the bill of complaint herein, upon which said order was made, is, in purpose and effect, a proceeding and order against the Government of the United States and its property; that the Government of the United States is a necessary and indispensable party to any suit seeking the relief as sought in the bill of complaint herein (if it could be impleaded as such) because of its ownership of, title to, and possession of said towboats and barges, and as the only party to the contract which is sought to be interpreted and enforced by the bill of complaint herein, and, for that reason, this defendant respectfully states that this proceeding and the injunctive order of this Honorable Court is without jurisdiction and null and
48 void; that in and by this proceeding the property rights and other rights of the United States of America are being sought to be adjudicated and foreclosed against it, although the said United States of America is not a nominal party to the proceeding and can not be made a party to this proceeding without its consent; that the United States of America is the owner of the towboats and barges referred to in the contract of May 28, 1919, and described in the bill of complaint herein, and that the possession of the complainant herein was only contingent, qualified, and conditional upon the performance of the terms and conditions of said contract, and that the property rights of the

United States of America are full and complete with respect to the said towboats and barges, by reason of its ownership and possession thereof, and of the failure of complainant, as hereinbefore alleged, to carry out and perform the terms and conditions of said contract.

This defendant further states that he has no interest in the said towboats and barges, either as an individual or as an officer of the United States, except as such officer to carry out the orders and instructions of his superiors with respect thereof; that the bill of complaint does not undertake to sue him as an individual, nor does the order of this Court undertake to restrain him from acting as an individual, but only in respect of his capacity as a representative of one of the Departments of the United States of America, and that this suit, while not nominally against the United States, is in its essence, effect, and consequence a suit or proceeding against the said United States, and, for that reason, all proceedings herein should be quashed and for naught held.

49 This defendant further shows that this proceeding is a proceeding in equity, the purpose of which, on the part of complainant, is to retake possession of the personal property, and that the complainant had a complete and adequate remedy at law for the determination of his rights in connection with such taking, if the same was in any wise unlawful, which this defendant denies.

Wherefore, this defendant prays that he be discharged from the rule to show cause herein; that this proceeding be dismissed as being one brought against the United States, and that the injunctive order herein be recalled and the same for naught held, and that this defendant be permitted to continue to hold said towboats and barges, and to retain possession thereof, as heretofore acquired by him.

(Signed) T. Q. ASHBURN,
Chief, etc.

State of Missouri,
City of St. Louis, ss.:

T. Q. Ashburn, defendant in the above-entitled cause, being first duly sworn, upon his oath, states that he has read the above and foregoing return to the order to show cause herein, and that the facts therein stated are true.

(Signed) T. Q. ASHBURN,
Chief, etc.

Subscribed and sworn to before me, a Notary Public, within and for the City of St. Louis, State of Missouri, this 14 day of April, 1923.

My commission expires Sept. 20, 1924.

(Seal.)

(Signed) G. W. HUTH,
Notary Public.

Filed April 14, 1923.

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- 50 (Return of defendant, John W. Weeks, Secretary of War, to order to show cause.)

Filed April 17, 1923.

Comes now defendant John W. Weeks, Secretary of War of the United States of America, and voluntarily entering his appearance herein, and for his return to the order to show cause herein why a temporary injunction should not issue against him, adopts the return of the defendant Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States, and prays that the Court accept said return as and for his return to the said order to show cause.

(Signed) LON O HOCKER.
Solicitor for said Defendant.

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- 51 (Return of defendant, James E. Carroll, United States Attorney, to order to show cause.)

Filed April 3, 1923.

Comes now the above named James E. Carroll, United States District Attorney for the Eastern District of Missouri, and for his return to the order to show cause heretofore, to-wit:—on March 25th, 1923, entered in the above entitled cause, states, and shows to this Honorable Court that he has not either in his official capacity or individually, had aught to do with the matters and things set forth in the bill of complaint herein referred to in the order of this Honorable Court; that he has not advised or counseled with any of the other defendants in this cause, or with any persons whatsoever, with reference to the taking of the barges and tow-boats referred to in the bill of complaint and mentioned in the order of this Honorable Court; whatever has been done in connection therewith has been done without any cooperation on his part, either in his official capacity or personally.

Wherefore, this defendant prays that the rule heretofore issued on him to show cause herein may be discharged.

(Signed) LON O. HOCKER.

Attorney for Defendant James E Carroll, United
States Attorney for the Eastern District of
Missouri.

United States of America,
Eastern Division of the Eastern } ss.
Judicial District of Missouri.

James E. Carroll, being first duly sworn, upon his oath states that he has read the foregoing return to the order to show cause in this cause, and that the facts therein set forth are true.

(Signed) JAMES E. CARROLL

Subscribed and sworn to before me this 2nd day of April,
A. D. 1923.

(Seal) (Signed) LELA O'NEAL,
Deputy Clerk U. S. Dist. Ct.

52 Motion and Suggestion of the Attorney General of the United States.

(filed April 6, 1923.)

Comes now the Attorney General of the United States and suggests to this Honorable Court, and gives it to understand and be informed (appearing only for the purposes of this motion) that heretofore, while the United States of America was in a state of war with the Empire of Germany, and pursuant to the Acts of Congress legally enacted, the President of the United States delegated to the United States Shipping Board Emergency Fleet Corporation the power and authority vested in him under certain laws establishing, enlarging and maintaining the emergency shipping funds, the authority to enter into contracts for the construction of nineteen (19) river barges and of four (4) towboats intended for use on the Mississippi River and its tributaries, and the said Fleet Corporation, in pursuance to said authority transferred to the Chief of Engineers, United States Army, the sum of Three Million Eight Hundred Sixty Thousand Dollars (\$3,860,000.00) for the purpose of paying for said towboats and barges, and that thereafter, pursuant to such authority, the said barges were constructed and paid for out of the funds so appropriated, and thereafter, by executive order of the President of the United

States, duly authorized, the said President of the United States, did, on March 12, 1919, withdraw from the United States Shipping Board Emergency Fleet Corporation such part of the power and authority vested in him under said laws with reference to said barges and towboats, and did by said executive order delegate to the Secretary of War the power and authority so withdrawn from said United States Shipping Board and United States Shipping Board Emergency Fleet Corporation, with power and authority to said Secretary of War to deal with said barges by contract or otherwise, with reference to the operation, management and disposition of the same as in his judgment should be most economical and advantageous to the United States of America.

That in pursuance to the authority so delegates the contract set forth in extenso in complainant's bill of complaint was entered into; that in the securing of the said contract, the said Edward F. Goltra represented to the United States of America and its officers that he had entered into various engagements and undertakings to increase the pig iron supply as a war measure, and that he was, and had been for a long time, familiar with the user and attempted development of the towboats and barges on the Mississippi River, and was peculiarly qualified to put forward and complete the plans of the Government of the United States with respect to the development of river traffic on the Mississippi River and its tributaries, and, in reliance upon said representations of said Edward F. Goltra, the said contract and the supplementary contract set forth in the complainant's bill of complaint were entered into.

That thereafter construction and completion of said barges and towboats continued, and, in the course of time, were ready for delivery to the said Edward F. Goltra, pursuant to the terms and provisions of said contracts, that thereafter, from time to time, the said Edward F. Goltra was requested by the United States of America and its officers to receive said towboats and barges and to put them into operation, as was contemplated in the contracts aforesaid, and finally on June 30, 1922, the Secretary of War advised the complainant that he must take physical possession of the said fleet of towboats and barges on or before July 15, 1922, or the same would be delivered back to the Government of the United States. That it was not until the said 15th day of July, 1922, that the complainant did take possession of said barges and towboats, as he was required to do under said contracts.

54 That it is provided in the said contract of May 28, 1919, that complainant should "operate as a common carrier the said fleet of three or four towboats and nineteen barges on the Mississippi River and its tributaries for the period of the lease, and of any renewals thereof," the period of said contract or lease under its terms beginning with the day of the delivery of the first of said towboats to said complainant, to wit:—on the 15th day of July, 1922:.

That notwithstanding the provisions of said contract that said complainant should operate said fleet of towboats and barges as a common carrier, he has made no effort so to do, and has not from the time he obtained possession of said towboats and barges acted or served the public as therein provided; that he has made no effort to comply with the Shipping and Merchant Marine Act of 1920 with regard to common carriers; that he has failed to comply with the Shipping Act regarding common carriers; that he has made no effort to file, and has filed, no schedule of joint rail and water rates with the Interstate Commerce Commission, and has made no effort whatsoever to make arrangements with the railroads or other common carriers to secure such rates; that he has created no organization for the purpose of operating said fleet of towboats and barges as a common carrier, and has failed to perform any service of transportation whatsoever, except in one or two instances under special arrangements with private parties, and that these movements were of slight consequence and extent, but that practically all of the time since the complainant has had possession of said fleet of towboats and barges the same have remained idle and out of service, that suggestor is informed and states, upon information and belief, that only one of the towboats, since it has been in the possession of complainant, has been under steam, and that only in connection with the one or two movements heretofore referred to.

55 That the object and purpose of the United States of America in entering into the contract with the complainant was to have the said barges and towboats used in commerce transportation upon the Mississippi River and its tributaries to demonstrate the practicability and economy of such service and encourage and stimulate the use of such waters, and that that purpose has entirely failed to be accomplished by reason of the failure of the said complainant to take steps or to make any effort whatsoever looking to

the utilization of said fleet in such commerce and transportation.

That numerous complaints have been made by individual citizens and organizations of citizens in various cities served by the Mississippi River and its tributaries, with reference to the failure of said fleet to be used for the purposes of commerce and transportation upon said rivers; that suggestor states, upon information and belief, that there was and is great and constant need for the services of said fleet in connection with commerce and transportation along these waterways, and that there were ample opportunities open to the said complainant to have utilized said fleet for the purpose of transportation and commerce, but that he has utterly failed and neglected to avail himself of the opportunities so afforded, and has neglected and failed to put himself in a position to act as a common carrier, as was contemplated in the contracts hereinbefore referred to.

That the United States of America has operated and now operates a barge line known as the Mississippi-Warrior Service in the lower Mississippi River and its tributaries, and that in such service it has had opportunity to make use of the barges and towboats delivered to the complainant under the contracts aforesaid, and, indeed, has had crying need for the same in order to take care of the business of transportation and commerce available to it, and has offered to pay the complainant fair and reasonable compensation and rates for the use of said barges and towboats,

56 in order that instead of lying idle they might be utilized for the purpose of transportation and commerce, but that said complainant has refused to make any arrangements, or to permit the use of said towboats and barges, or any of them, in connection with such service, notwithstanding the fact that he himself was making no use of the same.

That instead of caring for and conserving the said towboats and barges, as required by the contracts aforementioned, the complainant has neglected to care for and conserve the same and has permitted some of the said towboats and barges to suffer from exposure to the elements, and to be depreciated in value for service, and while not actually in service.

That in and by Article 8 of said contract of May 28, 1919, it is provided that non-compliance with any of the terms or

conditions of said contract would justify the termination of said contract and the returning of the fleet of barges and towboats to the United States, and that in pursuance to the terms and provisions of said contract, and of said article thereof, and because of the matters and things hereinbefore set forth, which the complainant neglected and failed to do, as he was obliged and bound to do under his contract aforesaid, the Secretary of War of the United States of America caused to be delivered to said complainant the notice dated March 3, 1923, set forth in subdivision 5 of the bill of complaint herein, wherein and whereby said contract was terminated in accordance with the provisions and stipulations of the contract itself, and demand made upon the said complainant for the return of the said towboats and barges to the representatives of the United States of America, as in said notice designated; that thereafter, on March 8, 1923, complainant responded to said demand by his communication of that date set forth in subdivision 5 of the bill of complaint herein, wherein he declined and refused to return said towboats and barges as demanded.

That thereafter, to-wit: on the 25th day of March, 1923, in pursuance of authority delegated to him by the Secretary of War of the United States, and pursuant to the terms of said contract, particularly Article 8 thereof, the defendant Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States of America, an officer of the United States Army, acting under orders of the Secretary of War of the United States, took possession of the said fleet of towboats and barges on the Mississippi River, and, in so doing, acted entirely without force of any kind, in a peaceful and orderly manner, and without creating any disturbance or breach of the peace, and the United States now has full, complete and actual possession of said towboats and barges, and has so had such possession since the 25th day of March, 1923.

That on said 25th day of March, 1923, complainant presented to the Honorable Judge of this Court his verified bill of complaint which is now on file in this cause, and the Honorable Judge of this Court to whom said bill of complaint was presented did thereupon undertake to make the following order in said cause:—

(Note)

(Said order is omitted here as it is contained in another portion of this transcript—Page 37, supra.)

Suggestor further shows to the Court that the order heretofore entered herein, enjoining the officer of the United States from taking possession of said fleet and directing the return thereof to the plaintiff, was improvidently entered and should be set aside for that it was entered without notice and without a hearing thereon and because the Court is without power of authority to proceed in invitum against the Government of the United States or its property, or its officers as such in possession thereof in relation thereto.

That the Government of the United States is a necessary and indispensable party to any suit seeking the relief as sought in the bill of complaint herein (if it could be impleaded as such) because of its ownership of, title to, and possession of said towboats and barges, and as the only party to the contract which is sought to be interpreted and enforced by the bill of complaint herein, and for that reason also the officers of the said United States cannot be
58 sued or enjoined, as is sought to be done in this proceeding.

That in making said order, particularly that portion thereof which required the defendants as officers of the United States to physically return the towboats and barges so taken to the complainant herein, the said Judge of this Honorable Court exceeded the power and authority and improvidently exercised the discretion conferred upon him, in that if said order were executed in respect to the physical return of said towboats and barges to the complainant the property rights and other rights of the United States of America would be unduly prejudiced and foreclosed against it; that said order of the Judge of this Honorable Court was made without notice to the defendants, and without any opportunity to be heard in defense of the action taken in respect to the taking over of said towboats and barges, and if the order of this Honorable Court is executed in its entirety, and particularly in respect to the physical return of said towboats and barges to the complainant, the United States of America will be irremediably damaged and deprived of the possession of said towboats and barges lawfully acquired by it under the terms and conditions of said contract.

That the United States of America is the owner of the towboats and barges referred to in the contract of May 28, 1919, and that the possession of the complainant herein was only contingent, qualified and conditional upon the perform-

ance of the terms and conditions of said contract, and that the property rights of the United States of America are full and complete with respect to the said towboats and barges, by reason of its possession thereof and of the failure of the complainant, as hereinbefore alleged, to carry out and perform the terms and conditions of said contract.

That the complainant has threatened to and will, if permitted by this Honorable Court, pray citation for contempt against the defendant Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States, for failure to comply with the terms of the order heretofore issued, and, if said citation for contempt is granted by this

59 Honorable Court and a contempt adjudged against said defendant, he may be required to turn over to said complainant the physical possession of the said towboats and barges, and the property rights of the United States of America therein, and, what is more, the power to use the same in connection with transportation and commerce on the Mississippi River and its tributaries will be cut off and the same be permitted to lie idle and unused in the hands of said complainant.

Wherefore, without submitting the rights of the Government of the United States of America to the jurisdiction of the Court, but respectfully insisting that the Court has no jurisdiction of the subject in controversy, he moves that the bill of complaint in this suit and the injunctive order of this Court be set aside, and all proceedings be quashed, stayed and dismissed, or denying this, that the order of injunction herein be modified, particularly the mandatory part of said order requiring the physical return of said towboats and barges, or denying that, that pending the determination of this controversy that a Receiver be appointed for the said towboats and barges with power and authority on the part of said Receiver to operate the same in transportation and commerce on the Mississippi River and its tributaries, as contemplated in the contracts set forth in the bill of complaint, until the final order of this Court.

(Signed) HARRY M. DOUGHERTY
Attorney General of the United States
of America,

By (Signed) LON O. HOCKER
Special Assistant to the Attorney General.

60 (Motion of Defendants to dismiss and to quash temporary restraining order.)

Filed April 17, 1923.

Come now the defendants herein and pray the Court to dismiss this proceeding and to quash the temporary restraining order heretofore issued for the following reasons to-wit:—

That the bill of complaint herein, while [nominally] filed against the defendants named therein, is, in its, essence, purpose and effect, a proceeding against the Government of the United States and its property, that the said Government is a necessary and indispensable party to any suit seeking the relief as sought in the bill of complaint herein (if it could be impleaded as such) because of its ownership of, title, to, and possession of, such towboats and barges and as the only real party (other than the complainant) to the contract which is sought to be interpreted and specifically enforced by the bill of complaint herein, and for this reason this proceeding and the injunctive order of this Honorable Court is without its jurisdiction and null and void; that in and by this proceeding the property rights and other rights of the United States of America are being sought to be adjudicated and foreclosed against it, although the said United States of America is not a nominal party to the proceeding and can not be made a party to this proceeding; that the United States of America is the owner of the towboats and barges referred to in the contract of May 28, 1919 and described in the bill of complaint herein; that the possession of the complainant herein was only contingent, qualified and conditional upon the performance of the terms and conditions of said contract, and that the property rights of the said United States are full and complete with respect to said towboats and barges by reason of its ownership and possession thereof; that these defendants, either as individ-

61 uals or as officers of the United States, have no interest in the said towboats and barges, and indeed, the bill of complaint does not proceed against them as individuals, but only in respect of their capacity as representatives of the United States of America, and that, therefore, this suit, while not nominally against the United States, is, in its essence, effect and consequence, a suit against the said United States, and for that reason all proceedings should be quashed and for naught held; that this is a proceeding in equity, the purpose of which, on the part of the complainant, as shown by the bill of complaint, is to retake possession

of personal property, and that complainant has a complete and adequate remedy at law for the determination of his rights in connection with the original taking, if the same was in any wise unlawful.

Wherefore, these defendants pray that the bill of complaint herein be dismissed *and that the restraining order heretofore issued be quashed, recalled and for naught held.*

(Signed) LON O. HOCKER.

Solicitor for Defendant.

62 (Order overruling motion to dismiss.)

April 30, 1923.

Now on this day the Court having considered the joint motion of defendants to dismiss this cause, being fully advised in the premises, doth

Order that said joint motion to dismiss be and it is hereby overruled. (Oral opinion).

63 (Order directing defendants to return boats,
etc., to St. Louis.)

July 7, 1924.

Now at this day comes the plaintiff by his Solicitor Douglas W. Robert, and the defendants by their Solicitor Lon O. Hocker, and it appearing to the Court that all of the boats and barges involved in this controversy are not now in the Port of St. Louis, it is ordered by the Court that a rule now issue directing said defendants to return the boats and barges not already in the Port of St. Louis into said Port on or before the 11th day of July, 1924, or failing therein to show cause on the 11th day of July, 1924, at 10:00 o'clock A. M., why they should not be punished for contempt of this Court.

(Signed) C. B. FARIS.

Judge.

64 (Order granting temporary injunction, etc.)

September 4, 1924.

This cause coming on to be heard for a temporary restraining and mandatory injunction at the March Term, 1924, of the said Court, upon plaintiff's bill of complaint, the

returns of the defendants heretofore filed herein and upon the evidence adduced by plaintiff and by the defendants, and the Court having considered the same, doth find that plaintiff herein, Edward F. Goltra, is entitled to the relief therein prayed for and it is therefore ordered that a temporary injunction be and is hereby granted plaintiff against the said defendants, Honorable John W. Weeks, Secretary of War of the United States; Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States and James E. Carroll, United States District Attorney, their agents, and servants, and anyone acting by, or through, or for them, restraining them or either of them from in any way interfering with the possession of the plaintiff of said boats and barges and other facilities and appliances of transportation in said bill of complaint described and from taking any of same from his possession, until the further order of this Court; and it is further

Ordered that said defendants, their agents and servants and all those acting by or through or for them be and hereby are commanded and ordered forthwith to restore to the plaintiff herein at the port of St. Louis, Missouri, all of said towboats, barges, and other facilities and appliances heretofore seized by said defendants, subject to an accounting to be had for any damage resulting from the use and possession of the said boats, barges, tools and appliances since the taking. It is further

Ordered, that plaintiff, forthwith, give a penal bond in the sum of Twenty-five Thousand Dollars (\$25,000.00) and

65 That said temporary restraining and mandatory injunction remain in full force and effect until final hearing of this cause and until further order of this Court.

(Signed) C. B. FARIS,
Judge.

(Oral Opinion.)

66 (Opinion on granting of temporary injunction.)

Filed September 8th, 1924.

The question, gentlemen, has not come before the Court yet upon its merits; it has come before the Court upon an issue which, in a way, is a bald technicality. But that is not for the Court. The Court sits here to determine the questions which are presented to the Court.

The issue is made here (referring to what I have [dominated] as a bald technicality) that the Government of the United States is a proper party, that the Government of the United States is not made a party, and it is urged that the Government of the United States cannot be made a party in this suit, absent its own volition, which it has not seen fit to exercise.

There are debatable questions of law in the case. There is not a single debatable question of fact in it, gentlemen. The bald facts are, that Mr. Goltra, in May, 1919, made a contract with the Government of the United States, one side says. The other side says it was made with certain individuals representing the Government of the United States. I might go further and say that the other side, that is to say, the plaintiff in the case, denies that the Government of the United States is a party. I question whether it makes much difference or not. That contract, among other things, provided (stating it substantially, because I have not got it before me), that in the event of default in the terms thereof on the part of Mr. Goltra, the Government of the United States, or the lessor, whoever it was (and I will say to you now I do not care very much) should have the option or privilege of taking these boats.

There came a day in 1922 or 1923 (at least the question of this issue became crucial in 1923) when the Government said to Mr. Goltra, "You have not lived up to your
67 contract. You have not complied with the terms of it, and therefore we have a right to abrogate it, to cancel it, to declare it at an end, and ask of you the return of these barges."

Mr. Goltra said, "You are in error about that. I have done everything, under the circumstances which my contract requires me to do. You have no right to take them."

Just there, gentlemen, a justiciable question arose between these parties, the same question that [would] arise if Jones were to say to Brown, "You have my hundred and sixty acres of land; give it to me." Brown says, "It is not your land." Jones says, "It is. I will go and take it," and Jones goes and takes it *vi et armis*. Now, that is the bald situation in the case.

There were proceedings at law, gentlemen, known of all men who are lawyers, by which the question legally could have been determined whether the contention of the lessor in this case was true or whether the contention of the lessee in this case was true.

The terms of the contract are plain. If the plaintiff, Goltra, had not complied with the contract then the Government had the right to take these boats, but the Government did not have the right, or the lessor did not have the right; nobody had the right to take them as long as it was an issuable contention between the lessee and the lessor as to whether the lessee had complied or not. Clearly here, Colonel Ashburn, now General Ashburn, [seting] under the orders of the Secretary of War, took those boats without any legal authority. There is not any question about that. The evidence is too plain to quibble about it, or too plain even to discuss it for a moment. Clearly, Colonel Ashburn had no right to take them as long as there was an issue requiring the intervention of the courts to decide whether Goltra was right in his contention or whether the lessor was right in its contention. That is too plain, gentlemen. I have no patience with the mental workings of anybody, be he lawyer or layman, who would assert to the contrary.

68 The Secretary of War, in my opinion, had no more right to order Colonel Ashburn to take these barges and these boats, if objection were made to that taking (and the proof in this case shows that there was objection made to their taking) than any private citizen would have any right to take the horse of another if that other claimed to own that horse, or claimed the right of possession of that horse.

I am not blaming General Ashburn in the case, because General Ashburn did what I believe I would have done if I had been an officer of the United States Army and had been requested by my superior to perform a certain duty. I should perform that duty if I could. But that does not make any difference. That simply is a sentimental question, which prevents any blame from attaching to the acts, personally, of General Ashburn. The question goes back farther than that: Did the Secretary of War have any right to take the law into his own hands and to send an officer of the United States Army to take by force; to take without authority, the property claimed by a private citizen? That question is too plain, gentlemen, for argument. Undoubtedly he had no such right.

Since the Government of the United States is not a party, since no decision of this question can be had without its presence, and since it arbitrarily refuses to come in, this situation arises: That the Government of the United States, through its officers (if the defendants' position be correct) may violate every provision of law and every provision of

the Constitution that has ever been written into law, decided by the courts as being law, or written into the Constitution, and then go unwhipped of justice. All that is necessary is for some man calling himself an administrative or executive officer of the Government to assume arbitrary powers when he acts as an officer of the Government; do what he pleases touching the rights of citizens, yes, touching their constitutional rights and then say, "I was acting for the Government. The Government is not a party. The Government will not become a party. You cannot touch me in law for that."

69 Now, gentlemen, that situation is unthinkable. It is unthinkable to say that an officer of the United States, be he the Chief of the War Department; be he the Chief of Engineers; be he the United States District Attorney, or be he what he may, may assume to act for the United States Government in derogation of the liberties of the people of the United States; in derogation of their constitutional rights, and [they] say, "You cannot touch us. The Government of the United States ought to be a party; it is not a party, and it will not become a party. You cannot make it become a party. Therefore your constitutional rights and your liberties as free men are whistled down by the wind and go for naught."

You cannot do that in this country, gentlemen; that thing cannot be done in this country, and that day when that thing can be done in this country marks twelve o'clock for this country as a republic. There is no use in discussing that. That is the situation here.

Now, I take this position: That neither the Secretary of War, a defendant here; nor Colonel Ashburn, a defendant here; nor Mr. Carroll, who is a defendant here by courtesy, at least, but whose interest it is hard to appreciate at this stage of the case, can assume to act for the United States Government when they do things not permitted to be done by an officer of the United States Government, or to be done by the Government itself. The great Government of the United States cannot be said to be standing under cover and permitting its officers to do in its name a thing of the monstrous and outrageous character shown by the evidence in this case.

This matter came up in the case of Lee v. the United States. I cited that case in a former opinion. In my opinion, as a lawyer and as a judge, the situation here is far more flagrant than it was there. There a [men] by the name

of Kaufman held for the United States certain property. Other officers of the United States (not Kaufman, I believe, but others who had had something to do with the subject-matter) acted in a like outrageous way. The
70 result of their outrageous and monstrous actions was that Kaufman was put into possession of certain property as the keeper and custodian thereof for the United States. Justice Miller, one of the greatest justices who ever sat on the Supreme Court of the United States, said that the Government could not be said to be behind an officer, who said he was acting for it, and who assumed to be acting for it, when that officer transgressed the laws of the United States, and transgressed the Constitution of the United States.

I think that is the rule, or rules, which govern here. I may be mistaken about it. It may be true that by simply standing out and permitting (if I may use the word; which is not the correct one) an officer to do for it an unconstitutional thing, a monstrous thing, an outrageous thing, the Government of the United States may profit and prosper, but I do not believe that when an officer of the United States acts unconstitutionally, acts illegally, the United States can be said to be behind what he is doing. If the United States, then, was not behind these men (and it was not behind them unless they were doing lawful things) then the United States cannot be said to be a party.

I pass over, then, the question of title, the question of who was the lessor; whether it was the United States, or whether it was somebody else. In a former opinion, after looking at all the law I could find upon the subject, and all the statutes I could find upon the subject, I came to the conclusion that under the authority of the Emergency Shipping Board case, that the United States was not a proper party here. I am still of that view; if necessary, I still continue to so rule. But I say to you, for the reasons that I have thus lamely given, that I doubt seriously whether it makes any difference, because (to close upon that point as I began) if officers of the United States, in the name of the United States, can do things of the kind that were here done; can arbitrarily do these things; can take the property of a citizen regardless of the courts, and without resorting to the courts, while they say to others, "You must be law-
71 abiding. You must go into court, you must not take the law into your own hands," then this republic cannot long endure under that species of tyranny.

A somewhat serious point of law arises in the case, gentlemen, by reason of the fact that it is somewhat unusual to ask for injunctive relief when you ask for no other relief. That is a debatable question in the case. I treat that thus: This is in the nature of a mandatory injunction, an injunction commanding the [retoration] of the status quo. I think that the law will reach it, even though it be not within the power of the court, under the pleadings here and under the evidence here, to decide the merits of this case. The merits, I repeat, as I said in the beginning, have not been touched on in this case. I think it is within the power of a court of equity, in a case where a mandatory injunction is asked, to require those who have done an illegal thing to undo that illegal thing, and [theus] preserve the status quo. If it is not the law then the circumstances in the case presented here discloses a regrettable situation, to characterize it by no stronger word.

Those are the two points in the case, gentlemen. One is: Is the United States an absolutely necessary party here? I say it is not, because I think that by no stretch of the imagination can it be truly said that the United States Government is countenancing, is ordering, is urging, those who assume to act in its name to do things of this character.

Upon the other question, I think it is within the Court's power, as the Court has already said, where a mandatory injunction is asked merely for the purpose of preserving the status quo, to act without looking legally into the case and merits thereof. I [count] not get to those merits here because there is no proof offered upon either side about them.

So I am going to issue a temporary mandatory injunction in this case, commanding the defendants in this case to restore these boats and barges to the possession of the plaintiff, Goltra, and such orders and judgments in the case as the proofs and pleadings will admit. You may prepare a decree to that end.

St. Louis, Missouri, September 4, 1924.

Now come the defendants, John W. Weeks, Secretary of War of the United States, Colonel T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service of the United

States, and James E. Carroll, United States District Attorney, and, feeling aggrieved by the order and decree of this Court of September 4, 1924, granting a temporary injunction against the defendants herein, present herewith their assignment of errors as to said order and decree and pray an appeal therefrom to the United States Circuit Court of Appeals for the Eighth Circuit.

(Signed) LON O. HOCKER
Solicitor for Defendants.

73

Assignment of Errors

(Filed September 18, 1924.)

And now come John W. Weeks, Secretary of War of the United States, Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney, defendants in the above entitled cause, and, in connection with their petition for an appeal from the temporary injunction order herewith presented and filed, say that in said order of September 4, 1924, manifest error hath occurred to the prejudice of said defendants in this, to-wit:

1. The District Court erred in holding and determining that the above entitled suit was not a suit in consequence and effect, against the United States of America.

2. The District Court erred in holding and determining that this suit was one against individual officers of the United States, and not one, in effect and consequence, against the United States itself and its property.

3. The District Court erred in holding and determining that it had the authority, power and jurisdiction to enter the order and decree of injunction entered in this cause against the individual defendants as officers and agents of the United States, and not in holding that said officers acted in behalf of and in the interest of the United States, and that, therefore, this suit was one, in consequence and effect, against the United States of America.

4. The District Court erred in holding and determining that it could, by its injunction order, take from the possession of the defendants herein the boats and barges involved in this controversy and deliver them to the complainant by its interlocutory order of injunction, without waiting for a full hearing upon the merits and without other relief than the injunction.

74 5. The District Court erred in holding and determining that the action of the defendants, and any and all of them, was in violation of their right and duty as defined by the contract involved herein, and that said defendants exceeded their authority in taking possession of the boats and barges mentioned in the bill of complaint without authority of judicial process, and that, therefore, the acts of the defendants were illegal and unjustified.

6. The District Court erred in issuing its temporary injunction against the defendants herein, for the reason that, in so doing, it, in effect, issued an injunction against the United States.

7. The District Court erred in issuing its temporary injunction against the defendants herein under the pleadings and the facts shown in the testimony and under said pleadings and facts should have denied the temporary injunction.

8. The District Court erred in excluding the notice of cancellation of the contract in controversy given after the commencement of the litigation by the then Chief of Engineers of the United States Army upon the objection of the plaintiff.

9. The District Court erred in admitting in evidence the transcript of testimony offered by the plaintiff taken at a former hearing in connection with the plea to the jurisdiction.

For which errors, defendants pray that the judgment of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, be reversed, and that the cause be remanded, with such instructions as, according to law and justice, shall seem meet and proper.

(Signed) LON O. HOCKER
Solicitor for Defendants.

75

(Order allowing appeal, etc.)

September 18, 1924.

Now on this day come defendants in the above entitled cause and file herein their petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, together with their assignment of errors; upon consideration whereof it is

Ordered that an appeal be and it is hereby allowed said defendants as prayed upon their giving a bond for costs in the sum of Five Hundred Dollars (\$500.00); and now de-

defendant present herein their bond in such sum, conditioned as required, which bond is duly approved by the Court and filed, and a citation issued and filed.

And now upon application of defendants it is Ordered that they be and are hereby granted thirty (30) days from this date within which to file a summary of evidence.

76

Bond on Appeal

(Filed September 18, 1924.)

Know All Men By These Presents, That we, John W. Weeks, Secretary of War of the United States, Colonel T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney, as principals, and American Surety Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York, as surety, are held and firmly bound unto Edward F. Goltra in the full and just sum of Five Hundred Dollars (\$500.00), to be paid to the said Edward F. Goltra, his executors, administrators and assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals, and dated this 17th day of September in the year of our Lord Nineteen Hundred and Twenty-four.

Whereas, lately, at the March, 1924, Term of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in a suit pending in said court between Edward F. Goltra, Plaintiff, and John W. Weeks, Secretary of War of the United States, Colonel T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney, Defendants, an order or decree was rendered against the said defendants, and said defendants have obtained an appeal from the said court to reverse the order or decree in the aforesaid suit, and a citation directed to the said Edward F. Goltra, citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, in the City of St. Louis, State of Missouri, within sixty (60) days from and after the date of said citation:

Now, the condition of the above obligation is such that, if the said John W. Weeks, Secretary of War of the

77 United States, Colonel T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney, shall prosecute said appeal to effect and answer all costs if they fail to make good their plea, then the above obligation shall be void; else to remain in full force and virtue.

Sealed and delivered in the presence of:

(Signed) JOHN W. WEEKS
Secretary of War of the United States.

(Signed) COLONEL T. Q. ASHBURN
Chief, Inland and Coastwise Waterways
Service of the United States.

(Signed) JAMES E. CARROLL
United States District Attorney.

By (Signed) LON O. HOCKER
Their Attorney & Agent.

AMERICAN SURETY COMPANY OF NEW
YORK

By (Signed) FRED H. DOENGES
Resident Vice President.

Attest: (Signed) VALLE K. WATSON
(Seal) Resident Assistant Secretary.

Approved by
(Signed) C. B. FARIS,
United States District Judge for the
Eastern Division of the Eastern
Judicial District of Missouri.

78 Praecipe for Transcript.
(Filed Oct. 9th, 1924.)

To the Clerk of the above named Court:

You will please prepare a certified transcript on appeal in the above entitled cause and include therein the following:

1. The bill of complaint filed herein, together with all exhibits thereto.
2. The temporary restraining order issued by the Court.
3. The return of the marshal of service of the temporary restraining order.

- 79 4. The return of the defendant T. Q. Ashburn to the order to show cause why a temporary injunction should not be issued.
5. The return of defendant John W. Weeks to the order to show cause why a temporary injunction should not be issued.
6. The return of the defendant James E. Carroll to the order to show cause why a temporary injunction should not be issued.
7. Suggestions and motion of the Attorney General of the United States to dismiss the bill of complaint.
8. Motion of defendants to dismiss proceedings and to quash the temporary restraining order.
9. Order of Court overruling motion of defendants to dismiss proceedings and to quash temporary injunction.
10. Order of July 7, 1924, directing defendants to return boats and barges to the port of St. Louis.
11. Temporary injunction issued September 4, 1924.
12. Opinion rendered by the Court at the close of the hearing of application for a temporary injunction.
13. Defendants' petition for appeal.
14. Defendants' assignment of errors.
15. Order granting appeal.
16. Bond on appeal and citation and plaintiff's acknowledgment of service.
17. Defendants' summary of the testimony at the hearing of the application for a temporary injunction.
- 80 18. This praecipe for transcript.

(Signed)

LON O. HOCKER
JAMES E. CARROLL

Attorneys for Defendants (Appellants).

Service of the foregoing praecipe is hereby acknowledged this 9th day of October, 1924.

(Signed)

JAS. T. DAVIS
DOUGLAS W. ROBERT
Attorneys for Plaintiff (Appellee).

81 Plaintiff's Additional Praeipe for Transcript
(Filed October 14th, 1924.)

To the Clerk of the above named Court:

In addition to the documents and orders called for in defendant's praecipec for transcript you will include with the certified transcript on appeal, the following:

1. The entry of appearance of John W. Weeks.
2. The order overruling the motion of the Attorney General of the United States to dismiss the Bill of Complaint.
3. This additional praecipec.

(Signed) JOS. T. DAVIS

(Signed) DOUGLAS W. ROBERT

Attorneys for Plaintiff (Appellee)

Service of the foregoing additional praecipec is hereby [adknnowledged] this 14th day of October, 1924.

(Signed) LON O. HOCKER

(Signed) JAMES E. CARROLL

Attorneys for defendants (Appellants)

82 Summary and Abstract of Testimony and Evidence Introduced at the Hearing of the Application for Temporary Injunction.

(Filed Oct. 28, 1924.)

Now come the defendants and present the following summary and abstract of the testimony and evidence introduced at the hearing of the application for a temporary injunction:

Plaintiff's Evidence.

83 Plaintiff offered and the Court admitted in evidence as Plaintiff's Exhibit No. 1" that certain lease contract dated May 28, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, party of the first part, and Edward F. Goltra, party of the second part. (This contract is omitted here for the reason that a copy thereof is attached as an exhibit to the bill of complaint herein.)

Plaintiff offered and the Court admitted in evidence the

supplemental contract between the same parties, dated May 26, 1921, marked "Plaintiff's Exhibit No. 2," as follows:

"Whereas, on the [twenty-eight] day of May, 1919, a contract was entered into between Major General W. M. Black, Chief of Engineers, U. S. Army, who, as well as his legally appointed successor, is hereinafter lessor

designated as the ~~executing officer~~ representing the United States of America, of the first part, and Edward F. Goltra, of the city of St. Louis, state of Missouri, his heirs, executors, administrators, or assigns, hereinafter designated as the lessee, of the second part, for chartering and leasing unto the lessee for a term of five years, subject to renewals, nineteen (19) barges and four (4) towboats, belonging to the United States.

And Whereas, It is found advantageous and in the best interests of the United States to modify the said contract as hereinafter specified, for the following reasons:

To more fully provide for the operation of the said barges and towboats as a common carrier by providing unloading facilities at St. Louis, Mo., by the use of funds remaining from the allotment of \$3,860,000.00 from the United States Shipping Board Emergency Fleet Corporation, and to provide for the sale of the said unloading facilities to the lessee under certain conditions.

Now, Therefore, the said contract is, by this Supplemental Agreement between Major General Lansing H. Beach, Chief of Engineers, U. S. Army, and the said contractor, on this 26th day of May, 1921, hereby
84 modified in the following particulars, but in no others:

The lessee will, at his own expense, within eight (8) months from the date hereof, provide the necessary tract of land and run-way on which the said unloading facilities are to be erected, stand and operate, said tract to be selected by the lessor, subject to approval by the lessee, and said run-way to be built according to plans submitted by lessee and approved by the lessor.

The lessor will erect on the said tract of land an unloading apparatus or facilities of a kind and character mutually agreed to by lessor and lessee as sufficient and

adequate to handle the cargoes to be transported by the said barges and towboats.

The said lessee shall, at his expense, maintain and operate the said unloading facilities in connection with the barges and towboats as a common carrier, subject to such charges for services of loading and unloading as may be approved by the Secretary of War.

The said lessee shall take out and maintain for the benefit of the United States insurance in such amount and with such companies as may be approved by the lessor.

The terms of the original lease as to net earnings (paragraph 3) appraisalment and option to purchase, and conditions of purchase (paragraph 5) method of payment in the event of purchase (paragraph 6), inspection (paragraph 8) shall govern so far as applicable and pertinent to the said unloading facilities.

In case the said lessee, his heirs, administrators, executors, or assigns, does not take over and pay for the said unloading facilities according to the aforesaid terms, then and in that case the lessor may, without let or [hinderance] by the said lessee, his heirs, administrators, executors or assigns take said unloading facilities in the same manner as is provided in the original lease as to the barges and towboats, or

In case the lessor does not desire to remove the said unloading facilities under the preceding paragraph, the lessor shall have the right to lease the land and runways on which the unloading facilities stand, for five (5) years with the privilege of renewals, the terms of such lease, if not mutually agreed to by the lessor and lessee, to be fixed by a board of three persons, one member to
85 be selected by the lessor, one member by the lessee, and one member by agreement between the two aforesaid members.

This Supplemental Agreement shall be subject to the approval of the Secretary of War.

In Witness Whereof the parties aforesaid have hereunto placed their signatures at the time of execution of this agreement.

Witnesses:

P. J. DEMPSEY

as to LANSING H. BEACH
Major General, Chief of
Engineers.

THOMAS M. ROBINS

Major, Corps of Engineers.

as to EDWARD F. GOLTRA.

Approved: May 27, 1921.

J. M. WAINWRIGHT.
Assistant Secretary of War."

Plaintiff offered and the Court admitted in evidence letter marked "Plaintiff's Exhibit No. 3," as follows:

"March 2, 1921.

To General Lansing H. Beach,
Chief of Engineers,
U. S. A.
War Dept.,
Washington, D. C. Attention: General Taylor, Asst.
Sir:

I am asked by various river cities to quote a definite rate to them for transportation of commodities by means of the boats and barges being constructed under my government contract. The different municipalities are in the process of installing terminal facilities and find that it is necessary to have definitely set forth by the Secretary of War what rates they may expect.

86 I respectfully suggest that I be authorized to quote them the same rates as obtain on the Government Barge Line now operating on the lower river, viz.—80% of the all-rail rates that now obtain.

Will you be good enough, if you approve of my suggestion, to communicate with the Secretary of War, notifying him of same.

Very respectfully yours,
(Signed) EDWARD F. GOLTRA."

Plaintiff offered and the Court admitted in evidence letter marked "Plaintiff's Exhibit No. 4," as follows:

"War Department
Office of the Chief of Engineers.
Washington.

March 3, 1921.

From: The Chief of Engineers, U. S. Army.

To: The Secretary of War.

Subject: Contract with Edward F. Goltra.

The contract entered into May 28, 1919, between the United States lessor, and Edward F. Goltra, lessee, concerning the operation of towboats and barges on the Mississippi River contains a covenant as follows:

'That the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War;' * * *

It is represented by the lessee that it would be advantageous to the operation of the vessels if the rates of transportation should be fixed at 80 per cent. of the prevailing rail tariffs. These are the rates charged on the government line now operating below St. Louis, and in my opinion it would be in the interest of the shipping public to permit the same rates to be charged on this line. I accordingly recommend that the Secretary of War give his consent thereto.

H. TAYLOR,
Brigadier-General, Corps of Engineers,
Acting Chief of Engineers.

Approved
Bumir

Mar. 4, 1921."

87 and the following notation attached to the aforesaid letter, marked "Plaintiff's Exhibit No. 4-A," as follows:

"117384/48—Subject: Rates on barges—contract with Edward F. Goltra

2nd Ind.

Office, C. of E., March 10, 1921—To the District Engineer,

U. S. Engineer

Office, St. Louis, Mo.

1. Referred for his information.

2. Although Mr. Goltra has been advised by letter of this office of even date he should likewise be advised by the District Engineer.

By order of the Acting Chief of Engineers:

THOMAS M. ROBINS,
Major, Corps of Engineers."

Plaintiff offered and the Court admitted in evidence letter marked "Plaintiff's Exhibit No. 5," as follows:

"War Department
Office of the Chief of Engineers,
Washington.

Refer to file No. 131054

March 10, 1921

Mr. Edward F. Goltra,
c/o Mississippi Valley Iron Co.
La Salle Building,
St. Louis, Mo.
Subject: Rates on barges.
Sir:

88 Referring to your letter of the 2nd instant, in reference to the rates to obtain on the barges owned by the Government and to be operated by you under your contract of May 28, 1919, with the Chief of Engineers, you are advised that your suggestion that the said rate be fixed at the same rates now obtaining on the barge line operated by you, namely 80 per cent. of the all rail rates, was approved by the Secretary of War on the 4th instant.

For the Chief of Engineers:

Very respectfully,

(Signed) Thomas M. Robins,
THOMAS M. ROBINS,
Major, Corps of Engineers."

Plaintiff offered, and the Court admitted in evidence letter marked "Plaintiff's Exhibit No. 6," as follows:

"War Department
Washington.

March 31, 1922.

Edward F. Goltra, Esq.,
LaSalle Building,
St. Louis, Missouri.

My dear Sir:

I am told there was recently an interview in the St. Louis Post-Dispatch in which you stated I had authorized you to make rates on the lower Mississippi at eighty per cent. of the railroad rates. I have not seen the interview so I am not clear that what I have stated is definitely correct. But, in any case, I told you at the time I could not authorize or approve any operation on the lower Mississippi that would enter into competition with the established line of barges. This line is operated for a definite purpose and should not be interfered with in that operation by any action of the Government.

I said if there was freight on the lower Mississippi which could not be handled by the present operating line and it could be transported by your barges, in that case I would authorize a rate of eighty per cent. of the railroad rate. In making this statement I was assuming that what you told me—that the present line could not handle the material which you mentioned—is a fact; 89 but any rate charged must be agreed to by General Downey and the operators of the present line.

Your contract calls for a rate not less than the railroad rate without the approval of the Secretary of War and I shall give no approval which does not carry out this general statement.

Yours very truly,

(Signed) JOHN W. WEEKS,
Secretary of War."

Plaintiff offered and the Court admitted in evidence letter marked "Plaintiff's Exhibit No. 7," as follows:

"April 18, 1922.

General Lansing H. Beach,
Chief of Engineers,
U. S. Army,
Washington, D. C.

Dear Sir:

For your information, I am herewith enclosing copy of a letter I am this day sending to Honorable John W. Weeks, Secretary of War.

Very respectfully yours,

(Signed) EDWARD F. GOLTRA."

It was admitted that General Beach was the successor of General Black, who executed the original contract.

Plaintiff offered and the Court admitted in evidence letter marked "Plaintiff's Exhibit No. 8," as follows:

"April 18, 1922.

Hon. John W. Weeks,
Secretary of War,
Washington, D. C.

Dear Sir:

90 It occurs to me that for the protection of my interests in case of accident to you or me that there should be reduced to writing a memorandum of the points in the conversation just had with you in your office this afternoon—hence this letter.

You desire to have a few days in order to afford time for your Legal Department to familiarize themselves with the contract I have with the United States Government, dated May 28, 1919, for certain tow boats, barges, and unloading apparatus, to the end that they may advise you of the legal status of same. This request I have granted, with the understanding and agreement that it is not to impair any of my rights under the contract.

I am returning home and you are to notify me when you will be ready to take the matter up with me again, and I will again return to Washington. Meanwhile, at your request, I am to do nothing about the bond, in-

surance policies, or any acts required of me under the said contract, it being understood and agreed that I am to be granted ample, necessary time to again furnish such things and to do such things as are required of me in the contract, all of which things I came prepared to do on the date set by you, namely, the 20th of this month, and offered so to do.

I feel very certain that your Legal Department will advise you I have a good and valid contract. Acting in good faith upon same, I obligated myself to transport hundreds of thousands of barrels of oil in bulk from New Orleans to Roxana, Illinois; also I have obligated myself to transport coal from Kentucky to St. Louis, up to 2,000 tons a day; I have also agreed to transport manganese ore from New Orleans to the blast furnace at St. Louis; these movements being based on 80% of whatever is the prevailing rail rate, as per my contract. As I stated to you, if I am now denied the use of the fleet, it means ruin to me. I cannot believe that such an injustice will be done me.

Very respectfully yours,

(Signed) EDWARD F. GOLTRA."

Plaintiff offered and the Court admitted in evidence letter marked "Plaintiff's Exhibit No. 9," as follows:

91 "To Edward F. Goltra,
St. Louis, Missouri.

You are hereby notified that under the provisions of paragraph 2 (a) of the certain contract #E7076 between yourself and Major General William M. Black, Chief of Engineers, United States Army, dated May 28, 1919, as supplemented by an amendment thereto dated May 26, 1921, the consent and approval of the Secretary of War heretofore, on the 4th day of March, 1921, given to the operation by you of the vessels covered by and included under the provisions of said contract, at transportation rates equal to 80% of the prevailing rail tariffs, is hereby withdrawn and cancelled as to any and all contracts, agreements or undertakings for transportation on the Mississippi River and its tributaries below the City of Saint Louis, Missouri, hereafter made and entered into by you.

From and after this date you are authorized to operate said vessels on the Mississippi River and its

tributaries below the said City of Saint Louis, only at transportation rates equal to and not less than the prevailing rail tariffs, save and except in such cases, and as to such transactions and commodities as the Secretary of War shall, upon application to him, have previously specifically consented to and approved.

(Signed) John W. Weeks,
JOHN W. WEEKS,
Secretary of War.

Dated at Washington, D. C.

May 6, 1922."

Plaintiff offered and the Court admitted in evidence letter marked "Plaintiff's Exhibit No. 10," as follows:

"War Department
Washington.

May 25, 1922.

Mr. Edward F. Goltra,
LaSalle Building,
St. Louis, Missouri.

Dear Mr. Goltra:

In compliance with the terms of my letter of May 6, 1922, you are hereby authorized to transport the following articles from port to port on the Mississippi River or its tributaries at not less than 80% of the all rail rates:

92 Liquids in bulk, including liquid asphalt or road oil, in drums; coal, lumber, sulphur, ties, cement, salt, sand, gravel, crushed rock; and grain over and above the capacity of the Mississippi-Warrior Service to handle such commodity.

Due to the conditions limiting the amount of grain which may be handled thru New Orleans, and due to the limited elevator capacity at Cairo and St. Louis, you will be required to obtain from Mr. Theodore Brent, Federal Manager, Mississippi-Warrior River Service, or his representative in St. Louis, Mr. J. P. Higgins, the amount of grain you may carry and specific dates upon which you can carry it.

The officials of the Inland and Coastwise Waterways Service, and the Mississippi Section, have been instructed to cooperate with you to the fullest extent in making the operation of your fleet a success; the only limitation being that you shall not engage in such com-

petition with them as to stifle the success of the Mississippi River Service. You will realize the necessity of the restrictions put upon you in the movement of grain but the other commodities offered you for transportation exceed all the claims you have heretofore advanced concerning contracts entered into by you for the transportation of any commodities.

Any further requests for modification of these restrictions should be addressed by you to the Inland and Coastwise Waterways Service, Washington, D. C., for their consideration and presentation to me with their recommendation.

Further, I assure you that if you decide to operate any or all of your boats on the Upper Mississippi, you are authorized to carry any and all commodities at not less than 80% of the prevailing all rail tariffs, between St. Louis and St. Paul, and you will meet with the heartiest cooperation of the officials of the Inland and Coastwise Waterways Service and the Mississippi River Section, in making such an operation a success.

A copy of this letter has been furnished to the Inland and Coastwise Waterways Service, Mr. Theodore Brent, Federal Manager of the Mississippi-Warrior River Service, and the Engineer Officer at St. Louis, Mo., the latter of whom will be charged with your compliance with the terms of the contract.

Once specific authority has been granted you to carry certain commodities at 80% of all rail rates, such as is herein contained, the District Engineer at St. Louis will also be charged with the duty of seeing that such limitations are respected by you.

Yours very truly,

(Signed) John W. Weeks,
JOHN W. WEEKS,
Secretary of War."

93 Plaintiff offered and the Court admitted in evidence letter marked "Plaintiff's Exhibit No. 11," as follows:

"War Department,
Washington, March 3, 1923.

E. F. Goltra, Esq.,
LaSalle Building, St. Louis, Missouri.

Sir:

Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier and in other particulars.

I therefore declare the said contract and the supplement thereto terminated. You are hereby directed upon the receipt of this notice immediately to deliver possession of the said towboats and barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States, to Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service, who will deliver this notice, and who is instructed and authorized to receive and receipt for the property herein mentioned.

Yours very truly,

JOHN W. WEEKS,
Secretary of War."

Plaintiff offered and the Court admitted in evidence memorandum attached to the foregoing letter, marked "Plaintiff's Exhibit No. 12," as follows:

"War Department,
Washington, March 3, 1923.

Memorandum for Colonel Ashburn:

94 My instructions in reference to the cancellation of the Goltra contract are that you proceed to St. Louis,

Missouri, and deliver to Edward F. Goltra in person the notice herewith inclosed of the termination of his contract and the supplement thereto, and make demand on him for the return of possession of said property to you as the agent of the United States, giving to him proper receipts for all of said property so delivered to you.

In the event of his failure or refusal to make delivery of the property demanded, you will apply to the United States District Attorney at St. Louis, requesting the institution of legal proceedings for the recovery of said property.

JOHN W. WEEKS,
Secretary of War."

Plaintiff offered and the Court admitted in evidence letter marked "Plaintiff's Exhibit No. 13," as follows:

"March 8, 1923.

To the Honorable the Secretary of War,
Washington, D. C.

Sir:

On Sunday, March 4, 1923, there was served upon me by Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service, your letter of March 3, 1923, stating that in your judgment I had not complied with the terms and conditions of my contract with the government dated May 28th, 1919, in that I had failed to operate the towboats and barges specified in said contract as a common carrier, and in other particulars; that therefore you declared said contract terminated and directed me to immediately deliver possession of said towboats and barges and unloading facilities erected pursuant to a supplemental contract, to said Colonel T. Q. Ashburn.

•This notice was served upon me while I was in Washington on other business and without any previous intimation that any step of this kind was contemplated, and I was informed by Colonel Ashburn that I must give an answer to this notice by six o'clock today.

The abruptness of the action attempted to be taken, and the very brief opportunity allowed for any answer on my part, necessarily requires that my reply be brief.

95 Most respectfully, I decline to comply with your demand. To do so would deprive me, without any notice whatever, or opportunity to be heard, of rights and property lawfully acquired at a very large expenditure by me of time and money. I have, in face of most unjust interference and restrictions, fully complied with all of the terms of my contract, and, further, I have complied with every demand or requirement made of me by either you or the Chief of Engineers of the United States, the lessor named in my contract.

The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has in fact no substantial basis on which to rest. This I believe will be fully demonstrated to you if I am granted a fair and impartial hearing to which, as a citizen, I am entitled, and which, in fairness and justice, I now request.

Very respectfully yours,
EDWARD F. GOLTRA."

CAPTAIN JAMES SIMMONS testified:

Direct Examination

I live at St. Louis; am a steamboat master and am now employed by the Mississippi Warrior Service; on and prior to March 25, 1923, I was employed by Edward F. Goltra as master of the Steamboat Illinois, which is one of the fleet of four towboats and nineteen barges. On March 25, 1923, those boats were in the possession of Edward F. Goltra. At eight o'clock on Sunday morning, March 25, 1923, Colonel Ashburn came down the Mississippi on the Steamer Vicksburg and landed alongside the Steamer Illinois. Upon landing Colonel Ashburn introduced himself and served an order on me, purporting to be [authority] to seize the boats, signed by Dwight Davis, and he formally took possession of
96 the boats in the name of the United States Government. That order was read to me by Colonel Ashburn. He did not give me a copy of the order, and I never saw a copy of it. When he served the papers on me he stated that any interference with him would be interfering with the United States Government, and I could be put in jail if I did interfere with him. I started to go ashore and notify Mr. Goltra, but I was called back by Captain Patton, who told me Colonel Ashburn wished to speak to me some more and advised me to listen to him. I came back, and

Colonel Ashburn repeated his threat of putting me in jail if I as much as telephoned Mr. Goltra. I did not observe that Colonel Ashburn was armed. Mr. Higgins and Captain Patton and Captain Warner were with Colonel Ashburn. Their coats were buttoned tight and they had a bulky object inside of their coats. The whole steamboat crew was there. There were approximately a dozen men or fifteen on the fleet. He took the boats and barges. There were four barges and four towboats there at the time. The towboats were the Missouri, Illinois, Minnesota and Iowa. They were docked at the foot of Ripa Avenue, which is in South St. Louis between the southern boundary line of the City of St. Louis and Jefferson Barracks on the Missouri side of the river. After they had taken possession of the boats they took them across the river approximately six miles down the river and fastened them along on the Illinois shore. There were three men with me on that day. None of us were armed. The men that were with me were the

97 Chief Engineer, Mr. Vick, Mr. James, the Assistant Engineer, and Mr. Fink, the night watchman.

Cross-Examination

I had been in the employ of Mr. Goltra since the 9th of August, 1922, at which time Mr. Goltra took possession of the boats. The only operation of these boats were one trip to Caseyville, Kentucky, and the other to Hannibal. We brought some coal from Caseyville to Crystal City—4,000 tons; 3,000 tons from Hannibal to St. Louis. These were the only transportation movements made by the fleet. The boats had been tied up at Ripa Street since about the 20th of September, 1922, and remained there until March 25, 1923, the day that the seizure took place. I saw no arms or guns displayed by the crew of the Vicksburg. Colonel Ashburn was followed on board by Mr. Higgins. Mr. Higgins did not stay on the Vicksburg until Ashburn had his first talk with me. Colonel Ashburn read the paper, signed by Dwight Davis, Assistant Secretary of War. He showed it to me and read the second paragraph. He said he was acting under the authority of that letter in taking the fleet. Some of the other barges were below Arsenal Street. There was no crew on those barges—simply two watchmen, one for the day time and the other for the night. I don't remember the exact date of the Caseyville movement. We took four barges on that occasion. On the Hannibal movement we took five barges and one towboat, the Illinois.

98 The Illinois was the only boat that was ever put in

commission. These movements were made before the close of navigation in 1922. No movements were made after navigation opened in 1923. Navigation closes about the 15th of December and opens the first part of March. It opened about that time in the year 1922; also in 1923. The Caseyville trip was made around August 15 or 20, 1922, and the return was made about the middle of September, 1922. The Hannibal movement was in October, 1922.

Redirect Examination

After the Vicksburg drew alongside of us the boatmen came off and began untying the mooring lines which held the boats to the shore. They [beban] untying the lines within ten minutes after Colonel Ashburn read the notice to me. The trip from St. Louis to Caseyville took about a month to the best of my recollection. The trip from St. Louis to Hannibal and return took approximately three weeks. I was not present when the cargo was discharged, but it ought to have taken four or five days to discharge the coal, and about the same length of time to discharge the cement. We used the Steamer Illinois on those occasions. She was better equipped than the others. She was the last boat finished and the last tested. The Illinois was an oil burner, and the others were coal burners. The Illinois was converted into an oil burner after Mr. Goltra

took possession; that is, after July 15, 1922. That was
99 one of our reasons for delay in starting to Caseyville.

I was familiar with the test made on the boats before the Illinois was converted into an oil burner. They had great trouble in making steam with coal. Since the seizure of these boats I have been in the employ of Colonel Ashburn and the Mississippi Warrior Service. I am still in their employ. They have had possession of the boats since March 25, 1923, the four boats and seventeen barges. They retained possession of them until about the 26th day of July, 1923, when they were brought into port. During that period the Steamer Iowa was used in addition to the Steamer Illinois. I should say that at least five or six and maybe more trips were made by the Iowa. None of the boats were used this summer except the Illinois. The only time the Iowa was used was last fall and winter. The Missouri and Minnesota have never been used.

JOSEPH VICK testified:

Direct Examination

I am an engineer, now in the employ of the Government. On March 25, 1923, I was in the employ of Mr. Edward F. Goltra as chief engineer on the Steamer Illinois. About 9 or 9:30 Sunday morning, March 25, 1923, the Steamer Vicksburg came down the river and landed alongside the Steamer Illinois. Colonel Ashburn came off of the Vicksburg and read a paper to Captain Simmons. I then went and called up Mr. Goltra and notified him that they were there and then came back aboard the boat. I walked over on head of the Missouri and Colonel Ashburn came up
100 to me and put his hand to my face and said that if I interfered with his picking up those boats he would put me where I would never get out. I reached up to brush his hand off my face and I touched his coat. He told me to keep my hands off of him, that he was a representative of the Government. That was all that was said at the time, but while I was talking to him I noticed that he had a holster on for side-arms, revolvers, that were partly covered by his coat. Whether he had revolvers in them I couldn't say. I should judge there were 25 to 30 men, scattered around the barges, with Colonel Ashburn at the time. They had all come off the Vicksburg. When I returned after notifying Mr. Goltra they had the fleet picked up and ready to go. They took the fleet about 8 miles down the river and landed on the Illinois shore.

After we landed on the Illinois shore Colonel Ashburn sent a man down to ask me to come up on the boiler deck, that he wanted to see me. I didn't go, but Colonel Ashburn came down into the engine room a few minutes later and asked if my name was Vick. I told him it was. He asked me if I wanted to work for him. I told him I couldn't work for him at that time because I was employed by Mr. Goltra. He asked me to go out and telephone and get relieved from Mr. Goltra, and I told him I couldn't. He then asked to get ready and he would take me back up town. I thanked him and told him I would go up town by myself. He set me across the river, and I got a train and came back to St. Louis.

Over the defendants' objection on the ground that
101 the seizure had already taken place, the witness was allowed to testify that after the fleet had been landed on the Illinois shore two men came on the boiler deck "cracking a shot a couple of times on the boiler deck." I

saw the arms that one man had that was shooting. Neither Colonel Ashburn nor Mr. Higgins was there at the time. They were on the Vicksburg. I was on the barges on Monday when the Deputy United States Marshal came over. Colonel Ashburn, when he came on the boat, was in citizen's clothes.

Cross-Examination

Colonel Ashburn was not in uniform. I was on the Illinois when we landed on the Illinois side of the river. These men that were shooting were shooting out on the shore. They shot twice. They were just shooting at a mark on the shore. The reason I came along in the boat was that I didn't have my clothes and property gathered up before they got out on the river. They didn't give me a chance to gather up my property. They began to tie on to these boats immediately after Colonel Ashburn came aboard. About an hour elapsed between the time Colonel Ashburn came aboard and the beginning of the untying of the boats by the crew of the Vicksburg. During that period they were engaged in gathering up and untying the lines and putting their boats in a position around to pick these up. I didn't actually see any pistols on Colonel Ashburn.

102 JOHN L. KENNEDY testified:

Direct Examination

I am a Deputy United States Marshal and was so employed on March 25, 26 and 27, 1923. On March 26, 1923, I was on a government tender, and we pulled alongside the Steamer Vicksburg about a mile and a half north of [St.] Genevieve on the Illinois shore. We then went aboard and I told Colonel Ashburn that I was a Deputy United States Marshal; that I had a writ for him and asked him if he would accept service, and he said he would not.

J. L. CLIFTON testified:

Direct Examination

I recall on Friday, March 27, 1923, of being with Deputy Marshal Knehaus and certain other parties going up the river from [St.] Genevieve. We were in my launch at the time, and I was operating it. We proceeded up the river and found these boats coming down the river between lights 526 and 527 on the Missouri shore. We crossed in front of

the first four boats we met. We drew up alongside of them just after they passed light 586. Mr. Knehans and Mr. Erwin boarded the boats and afterwards, between lights 583 and 582, they signaled me to get off, and I ran alongside, and they came back on my boat. The Vicksburg was about a couple of hundred feet from the Missouri shore at the time.

103 HENRY CASON testified:

Direct Examination

I am general superintendent of the Mississippi Valley Iron Company. That is the company of which Mr. Edward F. Goltra is president. The plant is located at 6500 Broadway. I was employed in that capacity on Sunday, March 25, 1923. On that date, about 2:30 or 3 o'clock, they called me at home and told me that Colonel Ashburn had taken the fleet from the Missouri Pacific wharf down there and was going to Potomac Street to get the other. I immediately picked up Mr. Wallace and drove to Potomac Street. At Broadway and Potomac I stopped to pick up a policeman. On getting to Potomac Street and the river, the Steamer Vicksburg was tied onto our seven or eight barges and some men were scattered over them. We went aboard with the policeman. I was first, then came the policeman and then Mr. Wallace. The first man I met was our watchman, Hays. I proceeded to where Colonel Ashburn, Mr. Higgins and Mr. Patton were standing. I knew Colonel Ashburn when I saw him, but not the other two. Just as I asked them what they were going to do, Mr. Wallace and the policeman appeared, and Mr. Wallace wanted to know what right they had on there. Mr. Ashburn read a paper to us, authorizing him to take the Goltra fleet anywhere found on the Mississippi River or something like that. I don't just know the words of it. I told Colonel Ashburn that we couldn't see the paper, didn't know what was on it, and asked him for a copy of it, and he turned the paper towards me and stuck it in his pocket. It was agreed between Mr. Wallace, the policeman and Colonel Ashburn that the policeman and I should go up to telephone, and that Colonel Ashburn should not proceed any farther until we came back so as to give the policeman time to talk with the Chief of Police, and see what he could do in the matter. While we were at the telephone, the fleet was cut loose, and when we looked again it was half-way across the river, and Mr. Wallace and Mr. Hays, the watchman, were coming up over the river bank to

where the officer and I were. I didn't see any arms on any of the men while I was conversing with Colonel Ashburn. They had on their coats and I couldn't see anything. I didn't see any firearms at all. There were eight or nine, possibly ten, men on the boats assisting Colonel Ashburn and Mr. Higgins, and I saw quite a few more on the deck of the Vicksburg, possibly five or six. Colonel Ashburn was standing on the north end of one of the barges when he was reading this notice to me, and I was on the south end of the barge next to it, with about ten or fifteen feet space between the two barges. The next time I saw Colonel Ashburn was on March 27 on the River just this side of Cape Girardeau. It was about sixteen miles up the River from Cape Girardeau, but I don't know just what town. We went up the river about ten or twelve miles, where we met the fleet of towboats. Myself, Mr. Knehans and Mr. Erwin went aboard the first fleet. We talked to Captain Simmons. We did not find Colonel Ashburn on the first fleet. Captain Simmons said

Colonel Ashburn was on the second fleet. I saw him
105 this side of Cape Girardeau and again at Fayville.

There were six or seven of the barges tied up at Fayville. I got down to the barges at Fayville about a quarter to seven on Tuesday evening, March 27th. Those barges at Fayville were a part of the Goltra fleet. We had a watchman on those barges by the name of Daly, who was in the employ of Mr. Goltra. Mr. Daly was in charge of those barges for Mr. Goltra at that point. Just after we arrived at Fayville and got on the barges the Vicksburg pulled in and tied onto one of them, and Colonel Ashburn came upon the barges and wanted to know who was in charge of the barges. Mr. Erwin spoke up and told him that he was. Mr. Daly, Mr. Erwin, a man named Beekley and myself were on the barges. Mr. Ashburn told him that they were now taking charge of the fleet by an order of the War Department and went ahead and read his warrant. Mr. Erwin did the talking. He told him that we refused to give him the fleet; that he had been served that afternoon with an injunction. Mr. Ashburn said that he had not been served with any injunction. He said, "To serve an injunction you must hand it to a man," and that he had received none, and Mr. Erwin told him that he had refused to accept it and that it had been tossed at his feet. Colonel Ashburn said he had not refused to accept it; that he had not said a word. He said, "I didn't say a word, did I?" Mr. Erwin said, "No, you didn't say a word, but your actions——". About that time Colonel Ashburn asked Mr. Erwin, or asked if there was

anybody there who was a United States Deputy Marshal of Illinois. Mr. Erwin told him he refused to answer that.

Mr. Ashburn told him that refusing to answer it he
106 refused to discuss the matter any further. Just as

Colonel Ashburn turned as if to go back Mr. Erwin said that he refused to give him the barges or to surrender the same. Colonel Ashburn said that he was prepared to take them peacefully and if he couldn't do that he was prepared to take them otherwise. I don't know what he meant by that—he didn't say. He went back on to the cabin of the Vicksburg and that is the last I saw of him. While he was reading this order and just about the time he was finishing it the other boats came down with the towboats; the Illinois was handling them, and someone hollered through a megaphone to Colonel Ashburn, and he told them not to go to the Missouri shore, but to go and tie up on the Illinois shore.

Cross-Examination

Respecting the agreement between Mr. Wallace and Colonel Ashburn about waiting for the policeman to telephone to the Chief of Police, the policeman told Colonel Ashburn he should not proceed to untie the boats, and Colonel Ashburn asked him if he proposed to resist an officer of the United States Government. The officer said he didn't know just where he stood on that, but if Colonel Ashburn would not proceed with the untying of the boats he would talk with the Chief of Police and find out what he should do in the matter. Colonel Ashburn asked him how long it would take, and he said possibly ten or fifteen minutes, and Colonel Ashburn agreed. Colonel Ashburn told him to go ahead and telephone, and that he would wait until he came back.

ROBERT E. ERWIN testified:

Direct Examination.

107 I live at 6626 Vermont Avenue, St. Louis, Missouri. I am Superintendent of the Mississippi Valley Iron Company, of which Mr. Goltra is the President. I was so employed in that capacity on March 25, 1923, and for some time previous thereto. On Sunday, March 25, Joe Vick, the Engineer on the Illinois, called me up about nine o'clock and said the Government was taking the boats at Ivory landing. I went in my machine and went down to the plant of the Mississippi Valley Iron Company and got our watchmen there and went down to the place where the boats were tied

up. The boats were swinging out into the stream at that time, and they were still tied to the shore by one line. I called to them and asked them what they were doing, and the men were working there trying to cut the line with some sort of an instrument; it looked like a sledge hammer or coal cutter. A minute or so after I arrived the line dropped; they cut the line to drop into the water and the boats swung out into the stream. After that I came to Mr. Robert's office in the Boatmen's Bank Building. I stayed there with Mr. Robert and Judge Allen until about three o'clock and then went out to Potomac Street. That was the time that the injunction papers were prepared. As soon as they were prepared I left. When I arrived there the barges had been moved out into the stream. I was at Fayville on Tuesday, March 27, with Mr. Cason. We arrived there about six thirty. Just after we arrived Colonel Ashburn came onto

the barge on which we were standing and wanted to
108 know whether there was anybody representing Mr.

Goltra. I replied that I represented Mr. Goltra, and he pulled from his pocket a paper which stated that the barges, wherever found, should be delivered to Colonel Ashburn, which was signed by Dwight Davis, Assistant Secretary of War. I saw the paper, but I did not have it in my hands. I asked him for a copy, but he refused to give me one or the original. He was standing possibly three feet from me when he read the paper. After he read the paper I told him that we refused to deliver the barges peacefully for the reason that he had been served with an injunction a few hours previous. Colonel Ashburn replied that he had not been served with an injunction. I replied that he had been served with an injunction, because I was personally with the Deputy Marshal when he had been served. He stated to me that, in order to be served with the papers, they had to be handed to you, and that was not done. I replied that this was not necessary. I said that as he had refused to accept service the Deputy Marshal had thrown the papers at his feet, with the statement that he was served, and that this constituted a service. Colonel Ashburn then asked me if I was United States Deputy Marshal of Illinois. I refused to answer, and he then told me, if I refused to answer, he would refuse to talk any further with me. He then turned to the watchman and asked him if he was the watchman on these barges. The watchman replied that he was, and he then stated that he took the barges for the War Department and that they were now in charge of the
109 War Department. He then turned to me and said he

would take these barges peacefully or forcibly, but that he was going to take them. He then told me if I didn't get off they would put me off. I was at Cape Girardeau with Mr. Cason and United States Deputy Marshal Knehans on March 27, 1923, and proceeded with them in a motor-boat up the Mississippi. About twelve or fourteen miles up the river we encountered the fleet, the Illinois coming down with three other towboats and two barges, I believe. We got on the first fleet and then got off and got on the second fleet. I was with Mr. Knehans when he went up to the pilot house. The pilot and Colonel Ashburn were there. Mr. Knehans told Colonel Ashburn that he had the papers to serve on him in the injunction case and asked him if he would accept service. Colonel Ashburn replied "I am in the pilot house." Mr. Knehans again asked him whether he would accept service, and Colonel Ashburn made no reply. Mr. Knehans then attempted to go into the pilot house, but the pilot took his right hand and shoved him back and said for him to stay out of there; that nobody was allowed in the pilot house. Mr. Knehans then leaned over into the pilot house and tossed the paper at Colonel Ashburn's feet and told him he was served. At the time we went into the pilot house the boat was just approaching the Missouri shore line, about three hundred feet from the shore.

HARRY HAYS testified:

Direct Examination

I live in St. Louis, Missouri. I am employed as a
110 watchman on the river. I am at present employed by
the Mississippi Warrior Service. On the 25th of
March, 1923, I was in the employ of Edward F. Goltra as a
watchman on the barge to take care of some barges that were
tied up on the river at the foot of Potomac Street. The
barges were in Mr. Goltra's possession at that time. Be-
tween three and four o'clock in the afternoon of March 25,
1923, the Steamer Vicksburg came up the river and landed
against the barges after I had protested to them not to land.
I asked them not to land against the barges. A gentleman
came aboard, who introduced himself as Colonel Ashburn,
and he told me he was there to seize the barges and take
them away. I asked him not to, and he then proceeded
to read an order to me, which I told him should be read
to Mr. Goltra, who was my employer, and I was only re-
sponsible to him. Colonel Ashburn then asked me if I

proposed to resist the United States Government. I saw the holsters of his gun under his coat, and I told him no, I didn't propose to resist, but that he was seizing the barges over my protest, and he told me he would be responsible for that and everything else. Captain Patton and Mr. Higgins were with Colonel Ashburn at the time. I did not notice anything on either of those two men. When Colonel Ashburn came up to read this order to me several of the men had gotten off of the Vicksburg. When they got the barges loose there were about fifteen or twenty men on the Vicksburg. It was only about five minutes

111 after Colonel Ashburn read this notice to me that the men began untying the boats. Colonel Ashburn did not give me a copy of the notice. I asked him for one, and he told me I could not have one. I saw the notice as he held it in his hand and read it to me. I communicated with Mr. Goltra's office before the barges were turned away and got in touch with Mr. Wallace, and he and Mr. Cason came up. They arrived there a few minutes before they were ready to leave with the barges. They had a policeman with them. Mr. Cason and Mr. Wallace came aboard and talked to Colonel Ashburn. Mr. Wallace asked Colonel Ashburn to wait with the barges and not take them away until the policeman communicated with the Chief. The policeman and Mr. Wallace went away to call up the Chief. They immediately proceeded to untie the boats. When I saw that they were going away I took my coat and walked off. At the time Colonel Ashburn and these men came on board there was no one there connected with the barges except myself. The barges had been untied before the policeman returned. They took the eight barges across the river on the Illinois shore.

EDWARD O. WALLACE testified:

Direct Examination

I live in the City of St. Louis. I am Treasurer of the Mississippi Valley Iron Company and disbursing officer of the Goltra Barge line. I was acting in that capacity for Mr. Goltra on March 25, 1923. On the afternoon of March 25, 1923, about 3:30 or 4:00 o'clock, I received word as
112 I was passing by the office of Goltra Barge line that someone was trying to seize the barges at the foot of Potomac Street, and that the boats and barges below Carondelet had already been seized earlier in the day. I proceeded to Potomac Street with Henry Cason, and on our

way we picked up a police officer. We then proceeded to the barges and found a steamboat at the lower end of the barges, with some twenty-five or forty men on board. I inquired who was in charge of the boat, and Colonel Ashburn said he had been ordered by the Secretary of War to seize the barges, and proceeded to read from a piece of paper an order that he was to seize the boats and barges anywhere on the Mississippi River. I asked the police officer to have him desist, but, on account of Colonel Ashburn being an officer of the Federal Government, the policeman did not care to make any arrest without first consulting his superior officer; so we asked Colonel Ashburn if he would hold up ten minutes until he could go to the telephone and consult his superior officer. Colonel Ashburn said he had been authorized by the Secretary of War to seize the boats. The police officer asked him if he would wait ten minutes and Colonel Ashburn said he would. Mr. Cason and the officer went to the telephone, and, while they were at the telephone, Colonel Ashburn came up to where I was standing and ordered me off the boats. I called attention to the fact that he had agreed to wait ten minutes. He paid no further attention to me, and they began tugging on the lines, and I told him he was taking the barges at his peril, that there was being an injunction prepared and that it
113 would be served on him. He asked me if I had it, and I told him I did not. After I told him that he ordered me off the boats. He told me I would have to get off; that he was going to seize the boats. Colonel Ashburn had about twenty-five or forty men with him.

JOSEPH T. DAVIS testified:

Direct Examination

I am one of the attorneys for Mr. Goltra in this proceeding. Early in March, 1923, I had a conversation with Mr. James Carroll, who was then District Attorney for the United States in this district in regard to the Goltra matter. I had several conversations with him. The first conversation was held between Mr. Carroll and Mr. Frank Davis, an attorney from Washington, D. C., who was also representing Mr. Goltra, in Mr. Carroll's office. I was present at that conversation. The three of us were there about the 7th of March; the subject of the conversation was the letter which had been served upon Mr. Goltra on March 3 or 4, 1923, wherein the Secretary of War Weeks stated that he had cancelled or terminated the contract. There was rather a lengthy discussion, the substance of which was that

Mr. Carroll said that he had been consulted by Colonel Ashburn and others with reference to taking some procedure for the purpose of taking possession of the boats and barges known as the Goltra boats and barges; that he personally thought some arrangement could be made whereby an agreement could be reached between Mr. Goltra and these
114 people. He went over considerable correspondence and informed us that he was thoroughly convinced in his own mind that Colonel Ashburn and Weeks were justified in seizing these boats and barges by force, if necessary. We informed Mr. Carroll we thought the proper procedure was for Ashburn and Weeks to take some action in court. Carroll informed us that he did not know just what sort of action these gentlemen could pursue following the termination of the contract. That was discussed at some length, and then it was that he said he thought they were justified in seizing these boats arbitrarily. We objected to that and contended that they had no such right; that they would be interfering with Mr. Goltra's constitutional rights. He used that then as an argument by saying that, if they seized these boats, Goltra would have a remedy by way of injunction relief, but that it would be burdensome to Mr. Goltra, because he would have to furnish a tremendous bond in that event. That, in general, was the substance of the first interview. The next interview occurred on Friday, March 9, I think it was. Mr. Carroll sent for me and asked me to meet him in his office again on Saturday, March 10, with reference to the matter, which I did. On that occasion there was no one present except Mr. Carroll and myself. He again brought up the subject of what procedure should be followed in the matter of taking possession of the boats and barges. He further stated that he was in hopes that some arrangement could be made so that they could get together, but that he was not authorized in any way to speak for anybody. In the course of that conversation, he
115 informed me that he had notified these people that his term of office as United States District Attorney had expired, and that he expected to be relieved in a very short time; that on account of the magnitude of this undertaking, which would require a great deal of time, he told these people that he could not and would not go into the matter as United States District Attorney without an understanding that he was to be employed privately, and that he had succeeded in making arrangements satisfactory to himself to be employed privately by these people. He further stated, if he succeeded in delivering these boats and barges, that he would be retained as counsel for the Mississippi Warrior Service. He also said that it was the inten-

tion of the Mississippi Warrior Service within about two years to have all of these boats and barges turned over to private interests or private parties. That was the general substance of the conversation; that was all the conversations which I had with Mr. Carroll because I had to leave town immediately after that.

DOUGLAS W. ROBERT testified:

Direct Examination

I am a practicing lawyer of the City of St. Louis, Missouri, and one of the attorneys for Mr. Edward F. Goltra in this case. As attorney for Mr. Goltra, I had a conversation in March, 1923, with Mr. Carroll as United States District Attorney. That conversation occurred about the 11th or 12th of March, immediately following the time Mr. Davis left the city. Mr. Goltra asked me to see Mr. Carroll in the absence of Mr. Davis. I went up to see Mr. Carroll, and Mr. Carroll told me that they were going to take
116 the fleet. I told them that they had no right to do that; that under Colonel Ashburn's orders it was his duty to bring legal action if they felt they were entitled to recover the fleet, and he told me that they were going to throw that burden on Mr. Goltra. I told him those were not Colonel Ashburn's orders; that we thought the action should be brought by Colonel Ashburn or Secretary Weeks, if they thought they had a right to recover. Mr. Carroll replied that it didn't make any difference what I thought about it. The burden was going to be on us. He then asked me if I had any suggestions to make with reference to a settlement of the matter. I told him that I had none, and I asked him if he had any. He said he didn't, but that, if I would make one, he would take it up with these people. I told him the only suggestion I could make was for them to file their suit in court if they thought they were entitled to recover the barges. We talked for about a half hour on the subject of trying to get me to make proposals as to how many barges we would lease to them and at what rates, and all the time he was assuring me that he could not bind anybody to any agreement of any kind whatsoever. All that he could do was to act as a go-between and take my proposals to them. There was some attorney from Washington, representing Colonel Ashburn, at that conference. Mr. Carroll told me the same thing that Mr. Davis has testified to, that he was not going into this case as District Attorney and take hold of this big matter and do all this work at the end

of his term, which had expired, unless he could be assured that he would be retained as attorney in the
117 case after he had gotten out of office. This attorney from Washington, whose name was Mr. Cole, as I recall it, also said, in Mr. Carroll's presence, that the Government was not going to bother itself about bringing any suits; that if there were going to be any brought Mr. Goltra had to bring them. I told him that Colonel Ashburn's orders were to consult the District Attorney about the bringing of legal proceedings. Mr. Cole said that they would change all of that when he returned to Washington; that he would recommend that the boats be seized, and that they would do anything he recommended.

Defendants' Evidence.

T. Q. ASHBURN testified:

Direct Examination

I am chairman and executive of the Inland Waterways Corporation of the United States. In March of 1923 I was Chief of the Inland and Coastwise Waterways Service Department of the Government, functioning directly under the Secretary of War. That was a branch or subdivision of the War Department. That organization was supposed to continue in full force and vigor the existing rail and water transportation and to develop water transportation as far as practicable. I was the chief executive in charge of that department. I delivered to Mr. Goltra the written notification which was offered in evidence this morning, which undertook to rescind the contract with reference to the barges
118 in controversy. That was delivered by order of the Secretary of War and at its direction. I gave it to Mr. Goltra in person at Washington. The first order was dated March 3, 1924, and has been offered in evidence as "Plaintiff's Exhibit 11." Exhibit 11 was the letter which I delivered to Mr. Goltra. I subsequently received other orders from the Secretary of War.

Defendants offered and the Court admitted in evidence letter marked "Defendants' Exhibit A," as follows:

“War Department
Washington.

March 22, 1923.

Colonel T. Q. Ashburn,
Chief, Inland and Coastwise Waterways Service.

Colonel:

1. You are hereby designated as the representative of the United States for the purpose of taking possession of the towboats and barges leased by the United States to Edward F. Goltra under a contract dated May 28, 1919.

2. You will proceed to St. Louis, Missouri, Fayville, Illinois, and, if necessary, to Paducah, Kentucky, or elsewhere the said property may be found, and at once take possession of all of the said towboats and barges, or any number thereof that may be found.

3. In taking such possession you are directed not to employ or use any action that will occasion strife, bodily force, or endanger the public peace.

4. If physical resistance be offered to your taking such possession you are further directed to report that fact with all attending circumstances to me at once.

(Signed) DWIGHT F. DAVIS,
Acting Secretary of War.”

The order was delivered to me the same day. It was dated March 22, 1923. On receipt of that order I
119 telegraphed to my subordinates, who were operating the Mississippi Warrior Service, to have the towboat Vicksburg meet me on the morning of a date which I designated. When I reached St. Louis I went to the Vicksburg, which was a government-owned towboat, operated by the Mississippi Warrior Service. I was accompanied to the boat by two officials of the Mississippi Warrior Service, Mr. J. P. Higgins and Mr. Patton. I told them, on the way down to the boat, what my purpose was. When I arrived at the boat I found that it was not even manned; that, instead of having eight, which is an ordinary crew, it had but four of the deck crew. We immediately got up steam. I informed the captain I was going to seize these Goltra boats. We first went out to where there were four towboats and four barges. I don't know the exact location; it was down in the southern part of the city. I was clothed in

civilian clothes at the time. I had weapons of any kind whatsoever. I did not have any holster on. I first went aboard the towboat. Nobody accompanied me when I first went aboard. I saw the captain of the boat when I went aboard—Captain Simmons. I told him I had come, at the orders of the Secretary of War, to take peaceful possession of the Goltra fleet, and I read him the order, which has been marked "Defendants' Exhibit A." He suggested that we get in touch with Mr. Goltra, as he was in Mr. Goltra's employ. I told him it was immaterial to me whether he got in touch with Mr. Goltra or not; that the order required me to take peaceful possession of the boats. I told him I wished he would not interfere or get in touch with Mr.

120 Goltra, because it might cause me to disobey my orders or fail to carry them out. He then started up the bank. In the meantime, Captain Patton and several of the men went aboard the fleet and were untying the barges and the towboats, and somebody called to Captain Simmons to come back, which he did. I then told him he had better go down to his cabin and go with the barge line. He then left me, but he didn't leave the boat. Then a man who said he was the chief engineer of the boat approached and told me he had been in touch with Mr. Goltra's representative; that I could not take the boats. I told him I had been appointed the representative of the United States to take the boats and to take them peacefully, and that I did not want to be interfered with. He then said I could not take the boats, and I shook my finger at him and told him to let me alone; that I did not like to be interfered with. At that he came up and I backed away from him. I told him to let me alone and he turned and left me. Nothing else happened, and we took the four towboats and two of the barges into our possession. There were not over ten men engaged in taking physical possession of the boats. None of these men were armed to my knowledge. I had made no arrangement for them to be armed or given any orders that they should be armed. There was no exhibition of any arms of any kind by anybody. I took the four towboats and two barges across the river and anchored them on the Illinois side about six miles south where I had seized them on the Missouri side. After that was done we came back to where there were eight barges tied up on the

121 Missouri side of the river. I don't know the exact spot, but it was further up the river than the original barges. The first seizure occurred between eight and nine o'clock in the morning. The second one occurred about half past ten. Respecting the second seizure, as the Vicksburg approached the towboat, the man who was on

watch said not to land on the boats, so we didn't land, but I directed the captain to take me up close to the boat and as soon as we got close to it I jumped on the barge and went up to this man and informed him that I was appointed by the United States to seize these boats and read him the order which has been marked "Defendants' Exhibit A." After I had taken possession of the boats, I asked the officers and men who accompanied me to come to take the boats, but I found that by this time we had so many boats that we did not have enough crew to handle them. We had exactly the same crew that we had at the time of the first seizure, but the number of barges and boats we then had in our possession were so great we did not have enough men to handle them. I directed Captain Patton to go ashore and get some men and bring them to the foot of Market street, where I would stop and pick them up, so that we could handle the fleet after we seized it. After we had been some time on the boats three men came down on the bank together, one of them being a police officer, and the other two I did not know. That was before the barges had been taken away. They came aboard and one of the men asked me who was in charge of the operation. I replied that I was. He stated that he [forbad] me to take the boats; that it was an act of piracy under the State of Mis-

122 souri. I replied that I did not know who he was. I didn't know what authority he might have to give me any such directions, but that I was a representative of the United States, and, as such, had taken peaceful possession of the boats, and that the boats were now the property of the United States, and that he was trespassing on the property of the United States. He then turned to the officer and told him to arrest me. The officer hesitated, and I asked him if he had seen my orders. He said he had not. I then told him to step over to where I was standing and that I would show them to him. He stepped over and read the orders and then stepped back. One of the men again told him to arrest me. The officer hesitated, and I told him that he had seen my orders and that he was perfectly satisfied that I was acting within my rights. I asked him if he knew the man who wanted to have me arrested, and he said he did not. I asked him if he had any authority to arrest me on United States property, when his authority did not extend to that. He said he did not know. I then told him that, if I were he, I would go and call up the Chief of Police and find out just what his action should be in the matter. One of the civilians then spoke up and asked me to wait ten minutes until he could call up the Chief of Police. I did not answer him at all. I then repeated

to the officer that the best thing he could do, in my judgment, was to find out whether or not he had authority to arrest me. He then turned and left the boat. I think one of the men went with him. The other man kept repeating that I had promised to wait ten minutes for this officer to come back. I did not answer him, because I had not promised anything of the kind. However, it took us about an hour before we could get those boats out, and, in the meantime, the policeman had been gone about three-quarters of an hour, and there were no signs of him. We were then ready to go out, and I spoke to the remaining man on the boat, and told him that I was going to take the barges over on the Illinois side; that he could go if he wanted to, but, if he didn't want to go, he could get off peaceably. I told him, if he did go, it was at his own volition; that I was not taking him. He then walked off the gang-plank, and we took the eight barges across the river. We did not have over ten men at the time. I did not get any additional men. One of the men stated that an order was being issued by one of the courts, restraining me from doing this. I asked him if he had any such order. He said he had not. I asked him if he had seen any such order. He said he had not. I said I did not know him at all; that anybody could come and tell me that they had an order, or that there was going to be an order prepared by the court, restraining me from doing this. After we tied up the eight boats on the Illinois side, I then came back on the Vicksburg and landed at the foot of Market street. We lay at the foot of Market street perhaps a half hour. In the meantime, Captain Patton had considerable trouble in getting any men. I think he finally reported with ten or twelve additional men. We took these additional men and by this time we had all the boats and barges except the two that had been in the original lot seized. They were still tied up. We went back to get those two that were tied up and there was nobody on them. Nobody made any opposition at any time, and we untied those barges. They were further down the river. We took them to the Illinois side of the river and stayed there all night. When we arrived at Fayville about dark, we found six barges there that I had seized. I went aboard and asked if there was anybody there representing Mr. Goltra. There were several people there, and I finally found one man that I decided to be the man who did represent Mr. Goltra and told him the authority I had for seizing the boats, and that I was taking possession of them in the name of the United States. There was nothing further

The Court: Is not General Beach merely an officer of the War Department, under Mr. Weeks, the Secretary of War?

Mr. Hocker: Yes. I do not agree that there is anything in their proposition, but sometimes we find there is more in a proposition than we think.

The Court: I think that there are two reasons: One of them is that a similar letter is already here, from the superior of General Beach. If that it not so, then it is self-serving.

I adhere to the ruling.

'Defendants' Exhibit B,' objection to which was by the Court sustained, is in words and figures, as follows, to-wit:

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'War Department,
Office of the Chief of Engineers,
Washington.

(Copy)

April 27, 1923.

E. F. Goltra, Esq.,
La Salle Building,
St. Louis, Missouri.

Sir:

Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier.

I, therefore, declare, the said contract and the supplement thereto, terminated. You are hereby directed upon the receipt of this notice immediately to deliver possession to the United States of the said towboats and barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States.

Yours very truly,
(Signed) Lansing H. Beach,
LANSING H. BEACH,
Major General, Chief of Engineers.'

Mr. Hocker: If the Court please, I desire to offer in evidence a photostatic copy of the bond executed by Mr. Goltra in connection with the original contract which is the subject-matter of this controversy. I have not a certified copy, but I would like to put this in evidence and if the gentlemen do not agree that this is a copy, I should like to be permitted to substitute a certified copy of it.

The Court: You are now offering the bond which Mr. Goltra gave to the Government upon the consummation or execution of the contract?

Mr. Robert: Yes.

The Court: What relevancy has it, Mr. Hocker?

128 Mr. Hocker: Well, it is a bond running to the United States of America. We have a controversy here as to whether it is a contract between the Chief of Engineers or between the Government of the United States, and Mr. Goltra, and the form of this bond as executed by Mr. Goltra is some evidence as to the parties to it, because it runs to the United States of America. That is the only purpose I have in offering it.

Mr. Robert: Under the contract, if the Court please, it is required that Mr. Goltra give a bond for two hundred thousand dollars, for the benefit of third parties, and this specifically provides here that the bond is executed for the protection of persons furnishing materials, labor, or services to the above bound Edward F. Goltra. It is just like bonds that are executed to the State of Missouri for the performance of duties, for the benefit of third parties.

The Court: Mr. Hocker is offering it as some evidence of an alleged estoppel, of course. That point would make no difference upon the question that Mr. Hocker has in mind. I shall overrule the objection and you may have your exception.

The substance of the bond, of course, gentlemen, is wholly irrelevant and immaterial and incompetent, but upon the theory that Mr. Hocker has——

Mr. Hocker: It is some evidence of our contention.

Mr. Robert: We do object to this because the original is not produced. This seems to be a form of bond——

Mr. Hocker: May I offer this at this time, agreeing to substitute a certified copy?

The Court: Yes.

Mr. Robert: We do not know whose form it is, whether it is one prepared by the Government itself or prepared by a surety company, or by whom.

Mr. Hocker: What has that to do with it?

Mr. Robert: It has a good deal to do with it, and there may be—

The Court: I will give Mr. Hocker leave to get a certified copy of that bond into this court.

(To Mr. Hocker) How long will it take you to do that?

Mr. Hocker: (To the witness) How long will it take you to get that, General?

129 A. If you telegraph to General Taylor to have a certified copy it ought to be three or four days.

Mr. Hocker: I simply want it for the record.

The Court: I cannot delay this hearing. I will let you offer that bond, or a certified copy of it.

Mr. Robert: I am informed by Mr. Goltra that this is a correct copy of the bond, and we withdraw any objection to its not being the original bond, but stand on our objection that—

The Court: I had already overruled your objection as to the contents of it.

Mr. Robert: I thought your Honor suggested that he could get a certified copy later on, and this is to save that trouble.

The Court: Very well.

The bond last offered in evidence is marked 'Defendants' Exhibit C,' and is in words and figures as follows, to-wit:

'Contractor's Bond (Public Works).

(When principal is an individual or a partnership, and surety is a corporation).

Know All Men by These Presents, That we Edward F. Goltra, of the City of St. Louis, Missouri, as princi-

pal, and National Surety Company, a corporation existing under the laws of the State of New York, and having its principal office in the City of New York, as surety, are held and bound unto the United States of America in the penal sum of Two Hundred Thousand dollars, to the payment of which sum well and truly to be made we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The condition of this obligation is such, That whereas the above-bounden Edward F. Goltra, has on the 28th day of May, 1919, entered into a contract with the United States, represented by Major General William M. Black, Chief of Engineers, United States Army, said contract being amplified by supplementing Articles of Agreement dated May 26th, 1921, for the leasing from the United States and the operation by said Edward F. Goltra of a fleet of four steel towboats, nineteen steel barges, and a coal and ore unloading bridge.

Now, Therefore, if the above [bounded] Edward F. Goltra, his heirs, executors or administrators, shall and will make prompt and full payment to all persons furnishing, during the term of one year from the date of
130 this bond, materials, services and labor in connection with the operation, furnishing, repair, care and maintenance of the said towboats and barges and the said unloading yard bridge, then this obligation shall be void and of no effect; otherwise to remain in full force and virtue.

The obligation of the surety shall be definitely limited as set forth in the next preceding paragraph above, and in a total amount not to exceed Two Hundred Thousand (\$200,000.00) Dollars.

E. F. G. E. V. T. Resident V. P. G. S. F. Resident
Asst. Secy.

In Witness Whereof, The Above-bounden principal and surety have executed this instrument under their several seals this 15th day of July, 1922, the name and corporate seal of said surety being hereto affixed and these presents duly signed by its Resident Vice-President, pursuant to a resolution of its Board of Directors, passed on the 13th day of June, 1921, a copy of the record of which is on file in the War Department.

In presence of—

FRED J. PETTY as to
(SEAL)

H. PAGE AYDLETT as to EDWARD F. GOLTRA
(SEAL)

Attest:

C. S. FRAN NATIONAL SURETY COMPANY
Resident Asst. Secre- By E. V. THOMPSON,
tary Resident Vice-President.'

(Rider attached to foregoing)

'This bond being executed for the protection of persons furnishing materials, labor or services to the above-bounden Edward F. Goltra, his heirs, executors or administrators in the execution of said contract, it is hereby agreed that the United States or any person, firm or corporation furnishing such materials, labor or services, may, if necessary to secure payment of their claims, bring suit upon this bond in the proper United States, State, County or City Court.

E. F. G. E. V. T. Resident V. P. C. S. F. Resident
Asst. Secy..'

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Cross-Examination

When I received this general order dated March 22, 1923, signed by Dwight Davis, Acting Secretary of War, marked "Defendants' Exhibit A," I was in the office of the Secretary of War. I was in the office of Mr. Dwight Davis at the time. I think it was in the afternoon of that day. I went there for the specific purpose of getting this order. That was after I had been to St. Louis with Mr. W. L. Cole, one of the Assistant Attorney Generals of the United States. It was after I discussed and had complied with the first order of Mr. Weeks in applying to the District Attorney to take possession of the barges. The order was not issued for some time after I had gone back. I had gone back to lay the matter before the Secretary of War and Assistant Secretary of War and Attorney General of the United States to ascertain the proper procedure to be followed. After I had been here with Mr. Carroll I was informed that Mr. Goltra would not turn the barges over to me. In the conference with Mr. Carroll, who was then District Attorney, and Mr.

Cole, there was some question as to how we could proceed by legal procedure. We did not know how we could proceed through an order of court to get possession of the barges, so I went back to Washington to lay the matter before the Secretary of War and Attorney General. When we were in St. Louis we agreed that it would be proper to seize the boats, but that was not final at all. When I got back to Washington I was met at the station by Mr. Davis, who was going away. He asked me what was being done about the Goltra matter. I explained to him the exact situation.

132 He told me to take it up with the Attorney General and see what the Attorney General or War Department would say was the proper thing to do. A letter was then written to the Attorney General of the United States, and there was a conference between the Attorney General and the legal officers of the War Department. This conference went on four, five or six days. They had a number of conferences before any of them could decide what was the proper method to pursue. Having decided that the United States had the right to seize these boats, the order was written out and signed by Mr. Davis. I did not specifically request that order. I recommended that an order be issued seizing the boats after the Attorney General had given me a written opinion. I received a written opinion from the Attorney General that I could do that. I did not ask that the letter be written. I did not ask them to write me a letter. I know I was very strongly in favor of such a letter being written and such action being taken, if that is what you mean. I seized the last of the two barges about ten o'clock Sunday night. When I first went aboard the barges I went by myself. Captain Patton and Mr. Higgins did not come aboard until I finished my conversation with the watchman, and I then told them to come aboard. Some ten or twelve men from the Vicksburg came upon the barges after Mr. Higgins and Captain Patton came aboard. They immediately began unloosening and untying the barges. It took them an hour or more to untie the barges and get them loosened from the shore. Then we took them to the Illinois shore. I took them to the Illinois shore because I was directed to seize these barges, and I thought that if I had them over on the Illinois side, I could arrange my tows and barges in such a way as to get them conveniently down the river. I was also of the opinion
133 that if I got them over to the Illinois side the court here would have no jurisdiction. After we got all the boats and barges together, including those in Fayville,

C. E. PATTON testified:

Direct Examination

I am Superintendent of the Mississippi Warrior Service. I have also been a river captain. I have been with the Mississippi Warrior Service for three years. I was requested to accompany Colonel Ashburn on the morning in March when the Goltra boats were taken. Mr. Brent wired me to be in St. Louis. I went down with him on the Vicksburg. When we arrived at the location of the boats Colonel Ashburn was the first to leave and went on the Illinois alone. He remained about ten or fifteen minutes. Then he beckoned us to come aboard, which we did. We went over the deck flooring of the boat and started to assemble the barges and boats preparatory to taking them in tow. No one in the party was armed as far as I know. I did not see any arms, or any show of arms, or holster on General Ashburn. We had a crew of probably four or five on the Vicksburg at that time. The actual seizure was done by those men. I saw the conversation between Colonel Ashburn and another man, whom I subsequently learned was the Chief Engineer. I did not overhear any part of that conversation. I noticed no conflict or assault during that conversation. After that I went ashore.

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Cross-Examination

There were only four or five deck hands who worked on the Vicksburg that Sunday. There were no more than that. Altogether, there were only six, seven or eight men at the outside who were engaged in the physical handling of the lines and cables. We had a full crew on the Vicksburg. By that I mean a crew of thirty men. Mr. Brent is the Federal Manager of the Barge Line. I was told by Mr. Brent to meet Colonel Ashburn on that Sunday morning. He informed me to that effect two or three days before. Mr. Brent told me to meet Colonel Ashburn Sunday morning, March 25, at St. Louis. I didn't know what I was to meet him for. Colonel Ashburn got down that morning. I suspected that we were going to take the Goltra fleet. I had no reason for suspecting that other than that the Mississippi Warrior Service needed them. Colonel Ashburn was at that time connected with the Mississippi Warrior Service. Brent, Higgins and myself were underneath him; he was our superior. I helped to fill out the crew in untying these boats and barges, assisted in untying them from their fastenings on the bank, and taking them away from the Missouri shore to the Illinois shore. I

did not follow Colonel Ashburn down to the Ohio River with these boats and barges. I left them at Cairo.

Redirect Examination

138 During the summer of 1922 these boats and barges were located at St. Louis. They were tied to the bank.

JAMES E. CARROLL testified:

Direct Examination by Mr. Hocker

I was formerly District Attorney for the United States in this District. In March and for some months shortly prior thereto I was engaged in the performance of my duties as District Attorney. Prior to the first visit of Mr. Joseph Davis, I had some very slight information of the barge controversy between the War Department and Mr. Goltra. About a week prior to Mr. Davis' first conference with me some man from the Department of Justice came into the office and said they had under discussion the question of the cancellation of the Goltra lines. At that time I told them I would rather not take up the problem because I had resigned and my resignation had been accepted. If they cared to have me do it I thought it would only be fair that I be continued in the case. At that time I recommended that, in my opinion, the better plan would be to employ outside counsel, which was later done. When Mr. Davis came in I remember very distinctly of calling his attention to that. Mr. Davis came in of his own volition. I had not sent for him. He prefaced his statement by saying that Mr. Goltra had received this notice. I don't remember whether he showed me the notice, or told me the contents. I told him that there had been some people here from Washington; that officially I

139 did not care to discuss it with him, but, knowing what had taken place between myself and these people in Washington, I told him that, in my opinion, the wisest thing to do would be to attempt to compromise the matter. We had some discussion. He asked my opinion as to what they might or might not do. I recall very distinctly telling him what I thought they would do, with the qualification that I was not speaking officially; that I had refused to take any official part in it by reason of the fact that I was about to leave the service. I recall that thereafter Mr. Davis came to see me again. Between his first and second visit, some other representative of the Govern-

ment had been out here and there had been interviews with business men around town—members of the Merchants Exchange, etc., and a general discussion of the failure of the use of the Goltra barges and the crying need for the barges in the City of St. Louis and the Mississippi Valley. I had sat in as an unofficial observer, so to speak. I thought the matter should be compromised. A part of my suggestion was that they take at least one-half of them and that Goltra turn over the other half to the Government. I was of the opinion that from what had been said that the Government was likely to take some drastic action. Mr. Davis said he would take the matter of compromise up with Mr. Goltra. Mr. Robert then came to see me. I had previously telephoned to Mr. Davis' office for him to come in to see me. I am no longer United States District Attorney. I have no interest in this controversy or in the boats other than
 140 that which I have recited. I never, even indirectly, had anything to do with the boats. I have never, to my knowledge, ever seen them.

Cross-Examination by Mr. Davis

I represent J. E. Carroll as a defendant in this case. I represented during the last two weeks or a month the Mississippi Valley Association, which is an association composed of the shippers of the Mississippi Valley, who have urged me to come into the case to see that we get somebody to run the boats. I did not represent the Mississippi Warrior Service—the Mississippi Warrior Service is now extinct. I do not represent its successors, the Inland Waterways Corporation. Colonel Ashburn was in my office about the 6th or 7th of March, after he had served Mr. Goltra with the notice of March 2, 1923. He never came to see me in any official capacity, but merely came in with Mr. Cole and Judge Lovett, who was the representative of the Department of Justice. They did not leave any files with me at that time. Subsequently, I saw a great deal of correspondence. That was just immediately prior to its being turned over to Mr. Hocker. I think that was about the 18th or 19th of April, 1923. Mr. Hocker's file will probably show the exact date. I recall that you and Mr. Frank Davis of Washington, D. C., discussed this matter with me as United States District Attorney immediately after Mr. Goltra's return from Washington, after he had been served with this
 141 first notice by Colonel Ashburn. I very distinctly recall stating to you that Goltra was wrong; that, in my opinion, you should compromise the matter. I

did not say that I thought the only way for the Government to get possession of those boats and barges was to take arbitrary possession of them. It is my recollection that, within two or three days after Frank Davis and you had been to see me that Friday, March 9, I called you up to make an appointment with me at my office, Saturday, about 10 o'clock. When you arrived I told you that I had no authority to speak for anybody in discussing the proposition of compromise, but that, if you would indicate that what I was suggesting to you was agreeable to you, I would try to get it to someone who would have authority. In talking to you, I was talking in an unofficial capacity. I recall suggesting to you that I had given this matter considerable thought and that, in my opinion—always talking in an unofficial capacity—I thought the very advisable thing would be to split this proposition up. I never told you that Colonel Ashburn was going to use arbitrary methods in taking possession of the boats and barges, but I do recall that I was of the opinion that the Government was going to take these boats. I did not state how, when or under what circumstances; I merely gave you my opinion as a citizen. I did not state to you that, if such drastic action became necessary, no quarter would be shown. I did not know in any of those discussions that eighty per cent of the rail rate had been taken away from Mr. Goltra. When Judge Lovett came over here with some of the papers, I discovered that he was getting eighty per cent of the all rail on a great many commodities, with probably the exception of grain.

Defendants rest.

Which was all of the evidence offered and heard on the application for a temporary injunction.
O. K.

JOS. T. DAVIS,
DOUGLAS W. ROBERT,
Attorneys for Plaintiff.

143 Order Approving Summary and Abstract
 of Testimony.

On this 28th day of October, 1924, on the motion of defendants, by their solicitors, it is

Ordered that the abstract and summary of the testimony and proceedings heretofore lodged in the Clerk's office by

the defendants is hereby approved and ordered filed as a part of the record in this cause.

(Sgd) C. B. FARIS
Judge.

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(Election as to printing of record.)

(Filed November 17, 1924.)

The defendants desire the transcript of the record in this cause for the use of the Clerk of the Circuit Court of Appeals, and elect that the record in this cause shall be printed under the supervision of the Clerk of the Circuit Court of Appeals.

(Signed) LON O. HOCKER
Attorney[s] for Defendants.

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(Clerk's Certificate to Transcript.)

United States of America,	} ss.
Eastern Division of the Eastern	
Judicial District of Missouri.	

I, Jas. J. O'Connor, Clerk of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, Do Hereby Certify, that the foregoing is a full, true and complete transcript of the record and proceedings in Cause No. 6339, In Equity, wherein Edward F. Goltra is plaintiff, and John W. Weeks, Secretary of War of the United States, et al., are defendants, (except insofar as the same is restricted by the Prae-cipe and Additional Prae-cipe for Transcript of the Record heretofore set out) as fully as the same remains on file and of record in my office, and that the original Citation is hereto attached.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Court at office in the City of St. Louis, in the Eastern Division of said District, this 17th day of November, in the year of our Lord nineteen hundred and twenty-four.

(Seal of United States District Court, Eastern Division of the Eastern Judicial District of Missouri.)

JAS. J. O'CONNOR
Clerk of said Court.
By JOSEPH M. WALSH
Deputy Clerk.

Filed Nov. 18, 1924. E. E. Koch, Clerk.

103 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Appellants.)

United States Circuit Court of Appeals, Eighth Circuit.

John W. Weeks, Secretary of War of the United States, et al.,
Appellants,

No. 6871. vs.

Edward F. Goltra.

The Clerk will enter my appearance as Counsel for the Appellants.

LON O. HOCKER.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Nov. 18, 1924.

(Appearance of Mr. Douglas W. Robert as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

DOUGLAS W. ROBERT.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Jan. 21, 1925.

104 (Appearance of Mr. Joseph T. Davis as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

JOS. T. DAVIS.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Jan. 27, 1925.

(Order of Submission.)

December Term, 1924, Tuesday, January 27, 1925.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Lon O. Hocker, Special Assistant to the Attorney General, for appellants, continued by Mr. Joseph T. Davis and Mr. Douglas W. Robert for appellee, and concluded by Mr. Lon O. Hocker, Special Assistant to the Attorney General, for appellants.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

(Opinion)

United States Circuit Court of Appeals, Eighth Circuit.

 No. 6871.—MAY TERM, A. D. 1925.

 John W. Weeks, Secretary of War of
 the United States, et al.,

Appellants,

vs.

Edward F. Goltra,

Appellee.

 } Appeal from the Dis-
 } trict Court of the
 } United States for the
 } Eastern District of
 } Missouri.

 Mr. Lon O. Hocker, Special Assistant to Attorney General, for
 appellants.

 Mr. Joseph T. Davis and Mr. Douglas W. Robert (Mr. Charles
 Claflin Allen was with them on the brief), for appellee.

 Before SANBORN, Circuit Judge, and POLLOCK and SYMES, District
 Judges.

POLLOCK, District Judge, delivered the opinion of the Court.

 For convenience, the parties will be designated as they stood on
 the record below.

 This appeal brings before this court for review an order granting
 appellee, plaintiff below, a temporary mandatory injunctive order
 against appellants, defendants below, enjoining and commanding
 them to restore to said plaintiff at the port of St. Louis certain tow
 boats, barges and other appliances theretofore by him held in pos-
 session under and by virtue of a certain written agreement of lease

entered into between plaintiff and the United States through its agent and representative designated by the Honorable Secretary of War on the 28th day of May, 1919, until defendant below, the Honorable Secretary of War, acting under and in pursuance of the terms of said lease, on March 3, 1923, determined the conditions of said lease had been broken by plaintiff and declared the same terminated and directed the restoration of the government's property to its representatives at the Port of St. Louis, Missouri. Said order of the Honorable Secretary of War terminating the lease not having been complied with by direction of the Secretary of War the fleet of barges and tow boats and handling facilities at St. Louis were seized by order of the War Department by Colonel T. Q. Ashburn, Chief of the Inland and Coastwise Waterways Service, when the order sought to be reviewed was entered.

But two questions are presented by this appeal. The solution of these questions determine the controversy. They are as follows:

(1) Is this suit one in legal effect and intendment against the government of the United States? (2) Is the question presented as to the right of the Government to re-take the leased property one committed to the decision, judgment and discretion of an official of the government, or is it a justiciable controversy for submission to and decision by a court of justice?

The controversy arises in this manner:

Growing out of the emergency created by the late war the necessity arose, or was thought to arise, of having towboats and barges on the upper Mississippi River employed in carrying coal and iron ore, and other heavy minerals, to St. Louis to be there used in the manufacture of iron needed in the production of munitions of war. To subserve this purpose the United States Shipping Board Emergency Fleet Corporation allotted to the Chief of Engineers of the United States armies the sum of three million eight hundred and sixty thousand dollars with which to have constructed at Point Pleasant, West Virginia, Pittsburg, Pennsylvania and Keokuk, Iowa, under contract of August 1, 1918, nineteen barges, and under plans and specifications prepared for such purpose by the government either three or four tow boats. These barges having been con-

structed, or nearing completion, and the towboats had been contracted for when the Armistice was signed and the emergency of war ended. The government then desiring to make some disposition and use of the fleet, and there having been prior negotiations with plaintiff, the written contract of lease, the terms of which are in controversy herein, was entered into on the 28th day of May, 1919, as follows:

"1. This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as the lessee, his heirs, executors, and administrators, party of the second part, witnesseth, that

"Whereas, the party of the second part at the request of certain government officials as an emergency of war, in order to increase the output of pig iron, made certain arrangements for iron ore and coal properties with a view to producing pig iron at St. Louis, Missouri; and

"Whereas the United States Shipping Board Emergency Fleet Corporation, allotted to the Chief of Engineers the sum of \$3,-860,000 for the construction of a fleet of towboats and barges for the primary purpose of transporting the said iron and coal to and from St. Louis, Missouri; and

"Whereas, on the first day of August, 1918, the United States of America entered into contracts for the construction of nineteen barges suitable to use for the transportation of said iron ore and coal; and

"Whereas the United States of America is about to construct by contract or otherwise a fleet of towboats for the purpose of towing the said barges, the construction of which in the opinion of the Secretary of War is necessary to enable the government to dispose of the said barges more advantageously; and

"Whereas the said fleet of towboats and barges is especially designed for and adapted to the transportation of iron ore and coal; and

"Whereas the said lessee has entered into various engagements and undertakings to increase the pig iron supply as a war measure, which may have created, and according to the contention of the lessee did create, obligations on the part of the United States to the said lessee, but which he entirely releases and discharges in part consideration of this lease, which engagements, undertakings, and lease are in furtherance of the original design for the assembling of coal and iron ore at St. Louis, Missouri, and for the increase of pig iron facilities:

"Now, therefore, the said lessor doth hereby charter and lease unto the said lessee for a term of five (5) years, beginning with the date of delivery to the lessee of the first barge or towboat and terminating five (5) years after the delivery of the first barge or towboat the following described property, viz:

"Nineteen barges which are being constructed under contracts dated August 1, 1918, with the Marietta Manufacturing Company, of Point Pleasant, W. Va., the Dravo Contracting Company, of Pittsburgh, Pa., and the Dubuque Boat & Boiler Works, of Dubuque, Ia., and three or four towboats about to be constructed and described in accordance with specifications prepared or to be prepared therefor.

"It is thereupon covenanted and agreed between the said parties as follows:

"2. (a) That the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal, and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made provided the Secretary of War consents to such use other than as a common carrier.

"(b) That the lessee shall pay all operating expenses of the fleet and maintain, during the continuance of the lease, each towboat and barge of the fleet in good operating condition to the satisfaction of the lessor; and shall hold the United States entirely free from all

liabilities and indebtedness of every kind in connection with the operation, care, and maintenance of the entire fleet and all its engines, boilers, outfit, tackle, apparel, furniture, and appurtenances; and the lessee shall, without unnecessary delay, as soon as he acquires any knowledge thereof, discharge any and all maritime liens that may at any time during the continuance of this lease from any cause arise against or become impressed upon any one, any or all of the fleet of nineteen barges and three or four towboats. The lessee shall procure and take out for the benefit of the United States, insurance, both fire and marine, in such an amount as in the judgment of the Secretary of War each of the vessels may require and with such underwriters or in such companies as are approved by the lessor, insuring each and every one of the barges and towboats against physical injury to them, or any of them, and against the loss of any or all of the barges and towboats hereby leased. The lessee shall likewise procure and take out fire, marine and towers liability insurance in such an amount as in the judgment of the Secretary of War each of the vessels may require with such underwriters or in such companies as shall be approved by the lessor, and for the benefit of the United States, insuring each of the vessels against such injury as may be inflicted by such vessel upon other property, such as might result in maritime liens, or in liability or obligation by the lessor, and, if the lessor shall require, execute and deliver to the lessor, a bond in the penal sum of Three Hundred Thousand (\$300,000) Dollars, conditioned to protect the United States against such liability or obligation and against any and all maritime or other liens against the fleet or any of the vessels of the fleet and against any and all depreciation in value of all or any of said vessels, by reason of maritime or other liens arising or becoming impressed upon them or any of them. Such bonds as in any part of this contract are required to be given by the lessee for the benefit of the United States shall always and at all times during the continuance of this lease be kept good and shall be replaced at any time by other good and sufficient bonds at the request of the lessor, and they shall be kept good not only against the impaired creditor or financial responsibility of the obligor or surety, but also against partial depletion or entire exhaustion thereof brought about by the payment of losses or indemnities thereunder.

"(b-1) All salvage earned, to which any of the said fleet shall become entitled, shall be for the benefit of the United States, after deducting all expenses incident thereto and the proportion due to the master, officers, and crew.

"(c) For the protection of persons furnishing materials, services, and labor in connection with the operation, furnishing, repair, care, and maintenance of the said towboats and barges, the lessee shall furnish to the lessor and continue in effect during the period of the lease, and in case of sale until title passes to the purchaser, a good and sufficient bond, approved by the lessor, in the penal sum of two hundred thousand (\$200,000) dollars.

"3. The net earnings above operating expenses and maintenance for each and every ton of cargo moved and all other net earnings shall be turned over by the lessee to the Secretary of War as soon as practicable after each proper determination of the amount thereof, but at least every ninety days, for deposit with the Treasurer of the United States to the credit of the Secretary of War in a special deposit account, and shall continue so to be turned over to him and so deposited by him until such time as said net earnings shall equal the full amount of the cost of the several vessels of the fleet plus interest on said cost at 4 per cent per annum computed from the respective dates of delivery of the several vessels of the fleet, and that thereafter all net earnings over and above the full amount of the said cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum, shall be deposited to the credit of the Secretary of War at least every ninety days by the lessee in one or more national banks in St. Louis, Missouri, to be designated by the lessor, to be held for the fulfillment of the terms of this lease, provided that earnings derived from the transportation of commodities in barges hereby leased, moved by towboats not furnished by the United States, shall, until all vessels of the Government fleet are delivered to the lessee, be subject to deduction of cost of the hire of the necessary towboats to move said barges, in addition to any other operating expenses and maintenance in connection therewith.

"The lessee shall keep accurate detailed accounts of all tonnage moved and of all moneys received and due and of all items of operating costs, and his accounts shall at all times be subject to inspec-

tion by the lessor or his representatives. The overhead expenses included in operating costs shall be subject to the approval of the lessor, and any items not approved by him and to which the lessee may object or take exception shall be referred to the Secretary of War, whose decision shall be final.

"4. The approved national banks shall be required to furnish good and sufficient bonds, approved by the lessor, in penal sum in amounts at least equal to the sum deposited conditioned for the safety of the funds held on deposit, as provided in this lease, said bonds to be delivered to the custody of the lessor and to be maintained during the period of the deposit. The said banks shall credit to the account interest at the local prevailing rates of nonchecking accounts.

"5. Within three months prior to the expiration of the lease, or of any period of renewal, or sooner, if so desired by the lessee, a board of three persons shall be appointed, one to be designated by the lessor, one by the lessee, and one by the said two members, unless they shall fail to agree, in which case the third member shall be appointed by the Secretary of War, all of whom shall be familiar with the construction and cost of river vessels of steel and with the current market values thereof, to appraise the value of the said fleet at that time, and the said lessee shall be given the option of purchasing the fleet upon the following terms:

"(a) If the funds turned over to the Secretary of War and deposited by him with the Treasurer of the United States, under section 3 of this lease, shall aggregate a sum equal to the full amount of the cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum as aforesaid, then in case of the exercise of said option by the lessee said funds shall be applied to payment in full for the fleet, and any net earnings over and above the amount required for such payment on deposit in said bank or banks, provided in section 3 of the lease, or otherwise held on deposit, shall be paid to the lessee.

"(b) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, under section 3 of this lease, shall be less than the full amount of the cost, plus accrued interest at the rate of 4 per cent per annum on such

cost, but greater than the appraised value, the funds shall in said event be applied to payment of the fleet at the appraised value, and any amount in excess of the appraised value shall be retained by the Secretary of War for the use and benefit of the United States; and the fleet shall thereupon become the property of the lessee.

(c) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, as provided by section 3 of this lease, shall be less than the appraised value, then in the event aforesaid such funds shall be applied to the payment of the fleet so far as they shall reach, and the lessee shall pay in addition thereto, in the manner specified in section 6 hereof, the amount whereby the aggregate funds so turned over to the Secretary of War fall short of the said appraised value.

"6. It is further covenanted and agreed that the method of payment of any amount which the purchaser shall be required to pay, and not provided for out of the sums deposited to the credit of the Secretary of War, shall be as follows:

"There shall be sixteen (16) payments. The first shall consist of all moneys on deposit to the credit of the Secretary of War, as indicated above, and shall be so applied at the date of the sale. The lessee shall execute for the balance fifteen (15) promissory notes, in equal amount, payable at the expiration of one year, two years, three years, etc., from date of sale with interest at 4 per cent per annum. Title to the property shall remain in the United States until the payment of the whole of the purchase price of said property.

"7. It is understood and agreed that the lessee assumes full responsibility for the safety of his employees, plant, and materials, and the said nineteen barges and three or four towboats, and for any damage or injury done by or to them and from any source or cause in the operation of the fleet.

"8. The lessor reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; and noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to

the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels.

"9. In the performance of the conditions of this lease, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction is prohibited.

"10. No member or delegate to Congress, or resident commissioner, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom; but under the provisions of section 116 of the Act of Congress approved March 4, 1909, (35 Stats. 1109), this stipulation, so far as it relates to members of or delegates to Congress or resident commissioners, shall not extend or be construed to extend to any contract made with an incorporated company for its general benefit.

"In witness whereof the parties aforesaid have hereunto placed their signatures of the date first hereinbefore written.

"Witnesses:

John Stewart,
Lt. Col. of Engineers,

as to

WILLIAM M. BLACK, (Seal)
Major General, Chief of En-
gineers, U. S. Army.
(First Party)

.....
Lt. Col., Engrs.,

as to

EDWARD F. GOLTRA, (Seal)
(Second Party)"

The entire contract is set forth above for the purpose of assisting in the determination of the two problems presented as above stated.

There was a supplementary contract entered into between the parties providing for loading and unloading facilities at the port of St.

Louis, May 27, 1921. However, as this supplemental contract is in entire recognition of the former contract of lease it does not in any respect modify its terms and the same is not set forth.

The fleet of towboats and barges were completed and turned over to plaintiff as lessee under the contract about July 15, 1921. He continued to hold the same in possession until March 3, 1923, on which date the Honorable Secretary of War determined the terms and provisions of the lease had not been complied with by plaintiff and issued the order of that date, which reads, as follows:

"War Department,
Washington, March 3, 1923.

"E. F. Goltra, Esq.,

La Salle Building, St. Louis, Missouri.

"Sir: Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier and in other particulars.

"I therefore declare the said contract and the supplement thereto terminated. You are hereby directed upon the receipt of this notice immediately to deliver possession of the said towboats and barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States, to Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service, who will deliver this notice, and who is instructed and authorized to receive and receipt for the property herein mentioned.

Yours very truly,

JOHN W. WEEKS,

Secretary of War."

Plaintiff refusing to comply with this order, on March 22d thereafter, Acting Secretary of War, Mr. Davis, issued to Colonel T. Q. Ashburn, Chief of Inland and Coastwise Waterways Service, the following order:

"War Department,
Washington, March 22, 1923.

"Colonel T. Q. Ashburn,
Chief, Inland and Coastwise Waterways Service.

Colonel:

"1. You are hereby designated as the representative of the United States for the purpose of taking possession of the towboats and barges leased by the United States to Edward F. Goltra under a contract dated May 28, 1919.

"2. You will proceed to St. Louis, Missouri, Fayville, Illinois, and, if necessary, to Paducah, Kentucky, or elsewhere the said property may be found, and at once take possession of all of the said towboats and barges, or any number thereof that may be found.

"3. In taking such possession you are directed not to employ or use any action that will occasion strife, bodily force, or endanger the public peace.

"4. If physical resistance be offered to your taking such possession you are further directed to report that fact with all attending circumstances to me at once.

(Signed) DWIGHT F. DAVIS,
Acting Secretary of War."

In pursuance of this order Colonel Ashburn proceeded to St. Louis, took possession of said fleet of towboats, barges, and also the loading and unloading facilities built at the port of St. Louis.

Thereupon, plaintiff filed his bill of complaint. A temporary restraining order, mandatory in form, was issued, followed by the making and entry of the temporary mandatory injunction appealed from and sought to be reviewed in this case. This reads, as follows:

"This cause coming on to be heard for a temporary restraining and mandatory injunction at the March Term, 1924, of the said Court, upon plaintiff's bill of complaint, the returns of the defendants heretofore filed herein and upon the evidence adduced by plaintiff and by the defendants, and the Court having considered the same, doth find that plaintiff herein, Edward F. Goltra, is entitled to the

"This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as the lessee."

Again:

"Whereas the United States Shipping Board Emergency Fleet Corporation, allotted to the Chief of Engineers the sum of \$3,860,000 for the construction of a fleet of towboats and barges for the primary purpose of transporting the said iron and coal to and from St. Louis, Missouri; and

"Whereas, on the first day of August, 1918, the United States of America entered into contracts for the construction of nineteen barges suitable to use for the transportation of said iron ore and coal; and

"Whereas the United States of America is about to construct by contract or otherwise a fleet of towboats for the purpose of towing the said barges, the construction of which in the opinion of the Secretary of War is necessary to enable the government to dispose of the said barges more advantageously" &c.

This contract also contains a further provision that all salvage earned by the fleet in operation after deducting expenses incident thereto and seamen's proportion, shall go to the government. In other words, it is not possible for the minds of reasonable men to disagree the subject-matter of the litigation is the sole and single property of the government. That the officials of the government named in the suit have no private interest or liability whatever in the matter, but in what they did acted as officials of the government for the government as their principal, under the law, cannot be doubted. In such case there can be no escape from the legal conclusion the suit is, as any suit for like purpose must be, in fact against the government in its legal effect, and that unless the government shall enter its appearance no decree as prayed in the bill of complaint may enter.

To this conclusion, under the facts of this case, come all the well considered authorities on this important subject. A reading and consideration of these authorities controlling here will disclose the cases generally to fall under a few distinct classifications and to be governed by well settled rules. In some of the adjudicated cases in which the plea has been interposed that the suit is in legal effect though not in name against the Sovereign, where this plea has been denied will be found to have been based upon the ground that the truth or falsity of the claim made creates a justiciable controversy, and on the hearing the court, on the facts, found the asserted claim not established. Thus, in the celebrated case of *U. S. vs. Lee*, supra, the claim was asserted by the officials of the government, Strong and Kaufman, that the suit was in legal effect one against the United States, and that they were merely acting as officials of the government in dealing with the property of the United States. However, the court on a hearing and examination of the facts denied this plea for at the trial it was found as a fact the property in dispute was the property of Lee and not the property of the United States, and that the officers of the United States attempting to deal with the property, while they were such officials of the United States as they claimed to be, yet they were not dealing with property of the United States but with the property of Lee to his injury. The reason why immunity was denied in that case is very clearly stated by Mr. Justice Miller, as follows:

"The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; * * * *but it certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual must arrest the proceedings of the court, and prevent their looking into the suggestion and examining the validity of the title.* * * * In this case, as in that, (*U. S. v. Peters*, 5 Cranch. 115) after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States."

In other words, in cases of the character of *Lee vs. United States*, the claim of immunity rests upon the particular facts of the case and the facts must be examined by the court in which the plea is presented, and if it be found the plea is not well founded in fact, must be denied.

Another class of cases in which the claim of immunity from suit on the ground it is in legal effect one against the Sovereign without its consent, will be found to be cases brought against parties claiming to have acted or to be acting in their official capacities under and by virtue of some provision of statutory law, but which on the hearing of the case it is determined, as a matter of law, the statutory power on which the claimed officials relied for their office is held to be unconstitutional and void, hence conferred on them no office or no power or authority to act in the premises. The cases falling under this head are very numerous. *Osborn v. Bank of United States*, 9 *Wheat.* 738, 843 868; *Davis v. Gray*, 16 *Wall.* 203; *Pennoy v. McConnaughy*, 140 *U. S.* 1, 10; *Scott v. Donald* 165 *U. S.* 107, 112; *Smyth v. Ames*, 169 *U. S.* 466; *Ex parte Young*, 209 *U. S.* 123, 159, 160; *Ludwig v. Western Union Telegraph Co.*, 216 *U. S.* 146; *Henrdon v. C. R. I. & P Ry. Co.*, 218 *U. S.* 135, 155; *Hopkins v. Clemson College*, 211 *U. S.* 636, 643-645; *School of Magnetic Healing v. McAnnulty*, 187 *U. S.* 94.

Still another class of cases in which immunity from suit is claimed and denied on the trial are cases in which actual officials of the government or state are proceeded against for the doing or threatening to do some act in which they claim the authority to so act under and by virtue of their office, but it is determined at the trial such officials were not in doing the act complained of within the scope of their authority as officials of the sovereign, but acting outside of any such official powers, their acts being *ultra vires*. Such was the case of *Philadelphia Co. v. Stimson*, 223 *U. S.* 607; *Lane v. Watts*, 234 *U. S.* 525; *Ballinger v. Frost*, 216 *U. S.* 240, and kindred cases.

As the title to the property involved in this controversy is concededly in the United States and plaintiff was a mere lessee, the rule in the case of the *United States v. Lee*, *supra*, and the like cases, have no application. That the Honorable Secretary of War was at the time an official of the United States and was acting for the

United States in leasing and dealing with the property in question, there can be and is no possible denial. Therefore, the only contention left remaining is that arising under the third classification of cases above mentioned. That is to say, was his act in cancelling the lease and ordering the return of the property to the government *ultra vires* and void; or, as an official of the United States, and the head of the war department of the government, was he acting within the scope of his power in declaring the lease contract made between the United States and plaintiff at an end?

The solution of this problem must depend upon the powers and duties of the Secretary of War as the head of the War Department of the government and the terms of the lease contract made between the government and plaintiff.

While it may be conceded had the lease contained no provision for reentry and retaking possession of the property, resort must have been had to some judicial tribunal in such case to ascertain and determine if conditions of the lease had been so broken as to terminate the lease. Again, if, on certain conditions specified in the lease, a right of cancellation and recovery of the property were stipulated, but without submitting the question of the happening or non-happening of such conditions to the judgment or discretion of any one, the question would again become one justiciable by the courts. Now, paragraph 8 of the contract of lease in question provides, as follows:

"The *lessor* reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; and *noncompliance*, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels."

Beyond all controversy, by simple plain language this provision of the lease reserved to the government the right, obligation, duty and power to cancel and abrogate the lease if, in the judgment of the representative of the government vested with power to make the lease,

the lessor, in his judgment, was not complying with any of the terms or conditions of the lease; for the government being an impersonal body or party to the contract, of necessity, it could not act except through its lawful representatives. This must have been and was well understood and known by the parties making the lease and that it would be exercised by the appropriate officials of the government in the enforcement of this and other provisions of the contract. The property involved in this controversy was under the control of the Department of War. The rentals of the property were required to be deposited to the credit of the Secretary of War, therefore as the Secretary of War was the head of the department to which the involved property was consigned it was under his direct and specific power and control to lease as is stated in the lease, and his judgment is the judgment to which paragraph 8 of the contract above quoted relates. So, just so certainly and surely as the decision of questions of dealings with the public domain of our country fall within the control of the Honorable Secretary of the Interior, it must be the property of the government constructed for preparations for war out of funds appropriated by Congress come under the control of the Secretary of War.

In this view of the case it must be held this is a suit against officials of the government in relation to property owned by the government and under their control as officials of government. Therefore, the plea of immunity from suit because in legal effect against the government itself, in its sovereign capacity, should have been upheld and sustained.

As said by Mr. Justice Pitney, delivering the opinion of the court in *Wells v. Roper*, 246 U. S. 335:

"That the interests of the Government are so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party, although not named in the bill, is entirely plain. And the case does not fall within any of the exceptions to the general rule that the United States may not be sued without its consent, nor its executive agents subjected to the control of the courts respecting the performance of their official duties. It cannot successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged

to be inconsistent with the stipulation under which it purported to be taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of official discretion. And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of the argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States. See *Noble v. Union River Logging Railroad*, 147 U. S. 165, 171, and cases cited; *Belknap v. Schild*, 161 U. S. 10, 17, 18; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 108; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620."

As has been seen, acting under the express terms of this contract expressed as clearly as words can express thought, intent or meaning of the writer, the Honorable Secretary of Interior considered and determined the question submitted to his judgment and gave his decision in favor of the reserved right of the government to cancel the contract.

In *Noble v. Union River Logging Railroad*, 147 U. S. 165, Mr. Justice Brown stated what that case involved, as follows:

"This case involves not only the power of this court to enjoin the Head of a Department, but the power of a Secretary of the Interior to annul the action of his predecessor, when such action operates to give effect to a grant of public lands to a railroad corporation.

"1. With regard to the judicial power in cases of this kind, it was held by this court as early as 1803, in the great case of *Marbury v. Madison*, 1 Cranch, 137, that there was a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial; that, with respect to the former, there exists, and can exist, no power to control the executive discretion, however erroneous its exercise may seem to have been, but with respect to ministerial duties, an act or refusal to act is, or may become, the subject of review by the courts."

In *Marbury v. Madison*, 1 Cranch, 137, Mr. Chief Justice Marshall, said:

"Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation."

In *Wells v. Roper*, supra, Mr. Justice Brown, delivering the opinion for the court, said:

"The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract and thus prevent the inauguration of the experimental service contemplated by the Act of 1914—a direct interference with one of the processes of government. The argument to the contrary assumes to treat defendant not as an official but as an individual who although happening to hold public office was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties. Indeed, it was only because of his official authority that plaintiff's interests were at all endangered by what he proposed to do."

In *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, Mr. Justice Peckham, delivering the opinion for the court, said:

"That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require

him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make."

In the same case, it is said:

"Neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion. *Marquez v. Frisbie*, 101 U. S. 473; *Gaines v. Thompson*, 7 Wall. 347; *United States v. Black*, 128 U. S. 40; *United States v. Windom*, 137 U. S. 636."

In *Decatur v. Paulding*, 14 Pet. 497, Mr. Chief Justice Taney, delivering the opinion for the court, said:

"We have referred to these passages in the opinion given by the court in the case of *Kendall vs. United States*, in order to show more clearly the distinction taken between a mere ministerial act, required to be done by the head of an executive department, and a duty imposed upon him in his official character as the head of such department, in which judgment and discretion are to be exercised
* * *

"We are, therefore, of opinion, that the circuit court were not authorized by law to issue the mandamus, and committed no error in refusing it. And as we have no jurisdiction over the acts of the secretary in this respect, we forbear to express any opinion upon the construction of the resolution in question."

As the decision of the question of the right of the government to cancel the lease was left to the decision, judgment and discretion of the parties to the lease, the question was withdrawn from the consideration of the courts of the country because it was one determinative of the executive will.

It follows, this suit being in its essential nature, though not in name, a suit involving the disposition of property of the United States, the United States in its sovereign capacity is the real party in interest as defendant, and being an indispensable party, no decree affecting its interests can go unless it is before the court. Therefore, the claim of immunity from suit on this ground should have been granted and its denial by the court was error.

Again, by the very terms of the contract in suit the right to cancel and annul the lease for non-compliance therewith by plaintiff was withdrawn from judicial power and was left to the judgment and discretion of the Honorable Secretary of the War, the representative of the executive power of government. And, in taking jurisdiction and determining the controversy as one of judicial inquiry in our courts, was also error.

It follows, the decree entered granting a temporary injunction must be reversed and the case proceed no further unless the government shall consent to submit its rights under the lease to the court in place of the Honorable Secretary of War where the duty of deciding was placed by the parties to the contract.

Filed July 23, 1925.

SYMES, District Judge, concurring.

I desire to emphasize a little more fully certain features in the case that appear to me important.

The allegations of the bill are important to consider. It is alleged that the plaintiff Goltra had entered into arrangements with the Government during the war for the establishment of plants and transportation facilities to increase the output of iron ore, coal, etc., needed in the prosecution of the war. That the United States constructed the 19 barges involved in this suit, to be used for transportation of iron ore and coal—also necessary towboats. That the termination of the war made it unnecessary to carry out these plans, and negotiations were then had between the plaintiff, Goltra, and the duly authorized representatives of the United States for the disposition of the boats that resulted in the contract in controversy, which it is alleged was entered into between the plaintiff and the United States.

The contract is then set forth. It recites: That the United States of America is about to construct a fleet of towboats for the purpose of towing the barges. That it, as lessor, represented by certain officials charters the boats to the lessee for five years, to be operated as common carriers upon the Mississippi River; the lessor

to regulate the rates to be charged, and the lessee, after paying operating expenses, maintenance, etc., shall deposit the net earnings in a depository, etc., all to the satisfaction and approval of the lessor. Paragraph 8 is important. It provides that the Government shall have the right of inspection at any time for the purpose of seeing that the lease is being fully performed, and when in the judgment of the lessor, non-compliance with any of the terms or conditions justify, it may, without notice, terminate the lease, and take the fleet back. It next alleges that a controversy arose with the Secretary of War over rates to be charged, and admits in effect that complainant did not, as agreed, operate the barges as common carriers, and pleads several excuses for his failure so to do; that John W. Weeks, as Secretary of War, notified lessee under date of March 3rd, that in his judgment the latter had not complied with the terms of the contract, in that he had failed to operate the tow-boats and barges as common carriers, and in other particulars, and he therefore declared the contracts terminated. It is alleged that the action of the Secretary of War in declaring the contract at an end was unlawful. It would seem, however, that a breach by complainant being admitted, this is nothing more than a legal conclusion, no facts being pleaded in support thereof. In short, the gravamen of the bill is that the Secretary of War exercised powers specifically given him by the contract.

At the hearing correspondence was introduced between Goltra and officials of the Government, in which the boats were referred to by plaintiff as the property of the United States, and Goltra himself under date of April 18, 1922, refers to the contract as one with the United States.

The court below states that if the United States is the lessor and owner of the boats in controversy, then the plaintiff cannot be heard to dispute its title, and the case must then be dealt with on the question of whether the court can afford any relief, unless the actual lessor is before the court. It comes to the conclusion that the funds with which these boats were built were transferred or loaned by the Emergency Fleet Corporation, and that therefore the legal title to the vessels was in it as trustee for the United States, although the custody and control was in the Secretary of War, and, further, that the United States was the beneficial owner and

"both Congress and the United States dealt with these vessels as if the United States not only was the absolute owner of them, but had the legal title to them, also absolutely."

Sec. 201d of Title II of the Transportation Act of 1920 provides, in effect, that these boats shall be operated by the Secretary of War for the purpose of providing facilities for water carriage on the Mississippi River. Irrespective of who furnished the money, the United States of America, according to the allegations of the bill and the terms of the contract, constructed the barges, and delivered possession of them to the lessee. Further, as the court below points out, the funds with which they were built, while technically they may have been furnished by the Emergency Fleet Corporation, were funds of the United States, appropriated by Congress for the purpose of building ships, and in possession of the Fleet Corporation only to the extent that the latter was an instrumentality of the Government, and transferred by order of the President to the Chief of Engineers for the purpose of building these vessels.

But an inquiry into the source of the funds seems irrelevant on the question of title, in view of the plaintiff's admission that the Government built the boats, delivered them to him, exercised dominion over them, and that he acted at all times on the assumption that he was dealing with the United States as owner. It would therefore seem that plaintiff is estopped from denying that the United States is owner, subject only to such rights as he had as lessee. It may be that the contract put plaintiff at the mercy of the Secretary of War, but the court cannot relieve him from a bad bargain. The agreement expressly vested in the Government, or the Secretary of War, the right in his discretion to terminate it for failure to perform. The courts cannot control the exercise of such discretion, when the authority to do the act is not challenged. *Philadelphia Co. v. Stimson*, 223 U. S., is not in point. Justice Hughes there says, p. 620, that the complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The converse is true in the case at bar.

In *Noble v. The Union River Logging Co.*, 147 U. S. 165, the court at p. 171, citing *Marbury vs. Madison*, states that no power

exists to control executive discretion, no matter how erroneous its exercise may be. This case is in point here, as this contract gave the Secretary of War the right to use his judgment in deciding whether there had been a breach or not, and the specific breach cited by him in his letter of March 3rd declaring the contract terminated, is admitted by the bill, and fully established by the evidence. There is neither allegation nor testimony that Goltra performed.

If we grant, as I think we must, that it was the Secretary of War's duty to exercise executive power and discretion generally over vessels built by the United States for war purposes, and which was specifically granted by the terms of this contract, then our inquiry is at an end.

The case at bar on the facts is similar to *Wells v. Roper*, 246 U. S. 335. The court said, (p. 337),

"And the case does not fall within any of the exceptions to the general rule that the United States may not be sued without its consent, nor its executive agents subjected to the control of the courts respecting the performance of their official duties."

And p. 338:

"And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of the argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States."

That was a case where it was sought—as it is here—to prevent an officer of the Government from annulling a contract, or from further interfering with its performance, and it was held that such a suit was one against the United States, although it was not named as a party, and therefore could not be maintained.

Minnesota v. Hitchcock, 185 U. S. 373, and *In re Ayres*, 123 U. S. 443, show that the courts look at the whole record in deciding whether the United States is a real party or not, and should decide the question whether it is so named or not. See also *Stanley v. Schwalby*, 162 U. S. 255.

U. S. v. Lee, 106 U. S. 196, is relied upon by appellees. But as Mr. Justice Miller points out there, the United States went so far as to contend that, though it did not have any title to the land in controversy, and what it set up as a title was no title at all, the court could not render judgment in favor of the plaintiff and against the defendants, because the latter held the property as officers of the United States. This argument was rejected by the court, because it being clear that the title to the property in question had always been in the plaintiffs, it followed that the acts of any government officials in taking and holding possession was trespass pure and simple, and they could not avail themselves of the immunity of the United States from suit. Further, as the court said, it was not alleged, and could not be contended, that Congress or the President had any lawful authority to take possession of the property in question. See also *Belknap v. Schild*, 161 U. S. 11.

Sloan Shipyards v. U. S. Fleet Corp., 258 U. S. 549, is also relied upon by appellee. But it differs from the one at bar because the defendant, the Fleet Corporation, was held to be a separate entity, incorporated under the laws of the District of Columbia. The court found that the bill stated a cause of action against the Corporation, because it could not be assumed from the allegations of the bill alone that the taking possession of the property in question by the Fleet Corporation was in pursuance of powers delegated to it by the President at the time that act occurred, or that it was included within the ratification of the past acts of the Fleet Corporation made by executive order.

In *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. at p. 184, the Supreme Court reiterates that the motive or mere abuse of discretion by a government official in exerting a power given, involves considerations that are beyond the reach of the judicial power, and that the judiciary may not invade the executive department for the purpose of correcting alleged mistakes or wrongs arising from an asserted abuse of discretion.

I cannot find on this record that the government officials arbitrarily interfered with property of the plaintiff. The boats were not his property, and his limited right of possession was lost by

his failure to operate them. Before they were seized there were negotiations between the parties, and he was notified that the Government would exercise its rights under the contract.

In conclusion, it must be remembered that the whole object of the United States in leasing these boats was to have them operated for the benefit of shippers in the Mississippi Valley; that Goltra attempted only two trips on the river and then tied them up at the wharf in St. Louis. The shipping public were complaining of the lack of service, so the Government then took possession in order to turn them over to a lessee who would give service to the public.

It would therefore seem that the motion to dismiss and to quash the temporary restraining order should have been granted.

Filed July 23, 1925.

SANBORN, Circuit Judge, dissenting.

When the controversy that resulted in this suit in equity arose, the plaintiff was in lawful possession of the four towboats and nineteen barges. The lease and contract of sale of May 28, 1919, and the delivery of possession of the vessels to him on July 15, 1922, had vested in him the lawful possession of the property and the absolute optional right by a compliance with the terms of the contract to the continuous possession and to the legal title to this property at any time prior to July 15, 1927, the time of the expiration of the term of the lease and contract of sale. He was in the position of an optional vendee of real or personal property to whom the vendor, bound by his contract to convey on payment by the vendee in the future of the unpaid part of the purchase price, has delivered the possession of the property. In equity he was the optional owner in lawful possession of the property and the vendor held the legal title to it as trustee for him, the *cestui que trust*.

The contract of lease and sale recited that the barges and towboats were to be constructed by the United States for and adapted to the transportation of iron ore and coal, but when they were delivered to the lessee and optional vendee, about July 15, 1922, they were so defective that he was compelled to expend and did expend

\$40,000 of his own money to make them operative. That contract provided that he should operate these vessels as a common carrier on the Mississippi River and its tributaries "at rates not in excess of prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War," and that the lessor reserved the right to inspect the plant, fleet and work to see that the terms and conditions of the lease were fulfilled and that "noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor."

On March 3, 1923, the defendant Honorable John W. Weeks, Secretary of War, without notice to or hearing of the plaintiff on the question of his compliance with the terms of the contract, in writing notified him that, in his judgment, he had not complied with them, in that he had failed "to operate the said towboats and barges as a common carrier and in other particulars," but none of these other particulars was described, and he declared the contract terminated and directed the plaintiff to deliver possession of the vessels to the defendant Colonel T. Q. Ashburn, who was authorized by him to receive and receipt for them. There was a "Memorandum for Colonel Ashburn" attached to this written notice whereby the latter was directed to deliver to the plaintiff in person the notice and to demand the possession of the property, the last paragraph of which read in this way:

"In the event of his failure or refusal to make delivery of the property demanded, you will apply to the United States District Attorney at St. Louis, requesting the institution of legal proceedings for the recovery of said property."

If this direction had been put into effect and such legal proceedings had been instituted, it seems probable that the rights of the plaintiff, the defendants and the United States would have been finally determined before this date and continuing litigation would have been avoided.

On March 8, 1923, the plaintiff in writing answered the demand for possession of the property. The pertinent portion of that answer was in these words:

"* * * Most respectfully, I decline to comply with your demand. To do so would deprive me, without any notice whatever, or opportunity to be heard, of rights and property lawfully acquired at a very large expenditure by me of time and money. I have, in face of most unjust interference and restrictions, fully complied with all of the terms of my contract, and, further, I have complied with every demand or requirement made of me by either you or the Chief of Engineers of the United States, the lessor named in my contract.

"The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has in fact no substantial basis on which to rest. This I believe will be fully demonstrated to you if I am granted a fair and impartial hearing to which, as a citizen, I am entitled, and which, in fairness and justice, I now request.

Very respectfully yours,

EDWARD F. GOLTRA."

The record discloses no reply to this answer and courteous request for a hearing, but without either on Sunday, March 25, 1923, the defendants, without the consent and against the protest of the plaintiff's agents in possession of the vessels, with a coercing force of men, took possession of the boats and barges at St. Louis, Missouri, and ran them down the river and held them upon the Illinois side thereof in the belief that the District Court below had no jurisdiction over that portion of the Mississippi River between Missouri and Illinois adjacent to the Illinois bank. As soon as this sudden Sunday seizure came to the knowledge of counsel for the plaintiff they prepared and presented to the court below his bill in equity against the defendants, wherein he prayed for a restraining order and an interlocutory injunction against them for the purpose of holding the property in the possession of the plaintiff in the state in which it was before the sudden Sunday seizure, until the claims of the respective parties thereto could be fairly heard, considered and decided.

The only specific charge in the demand for possession of these vessels was that the plaintiff had not operated the vessels as a common carrier. In his bill in equity the plaintiff alleged that by

the provisions of the lease and contract the defendant, the Secretary of War, had the control of the rates which the plaintiff might charge for transportation of commodities by the use of these vessels, that he obtained contracts for the transportation of immense quantities of commodities at reasonable rates, but that the defendant, the Secretary of War, by the use of the power over his rates vested in him by the lease and contract prohibited him from operating or refused him the necessary permission to carry commodities at operative rates either as a common carrier or as a private carrier and thereby arbitrarily deprived him of the opportunity to carry out his contracts with shippers and made it absolutely impossible for him to operate the vessels either as a common carrier or otherwise.

The plaintiff prayed for an immediate restraining order, an interlocutory injunction against the sudden seizure, removal and possession of this property by the defendants and for an ultimate determination by the court below of his right to the possession and his equitable interest in this property. On this bill and the facts which have been recited his counsel immediately invoked the exercise by the court below of its judicial discretion to preserve the status and possession of this property by its restraining order and its interlocutory injunction as they existed prior to the defendants' seizure until there could be a hearing, consideration and decision by the court of some of the rights and equities of these parties. The plaintiff was met not by answers by the defendants to the merits of the bill, but by a claim in their returns to the order to show cause why the injunction should not issue that the court had no jurisdiction of the suit because the United States was a necessary party to it and by a claim that the Mississippi-Warrior Service, a barge line which the United States was operating on the Mississippi River and to prevent the plaintiff's competition with which he alleges in his bill he was informed that the Secretary of War had prevented his use of operative rates, had offered to use his barges and towboats and to pay him fair compensation for such use. But his acceptance of such an offer would not have constituted a performance of his contract to operate these boats and barges as a common carrier or otherwise. He was also met by the suggestion of the Attorney General of the United States that the Nation was a necessary party to this suit and, by his motion, appearing only for the purpose thereof, to dis-

miss this suit on that ground. The district judge below patiently heard the claims and arguments of the parties to this suit, deliberately and exhaustively considered them, denied the motion to dismiss the suit and granted the restraining order and the interlocutory injunction and wrote careful opinions in which he clearly set forth his reasons for his action.

This case is in this court on an appeal from his order granting the interlocutory injunction. The decisive question presented to him upon the application for that injunction was, whether or not in the exercise of his judicial discretion he ought or ought not by his injunction to hold these vessels temporarily until there could be a fair hearing and just decision of some of the important issues in this case in the position and situation in which they were when defendants seized them. By the established principles and rules of equity jurisprudence the authority was granted to and the duty, which he could not lawfully renounce or evade, was imposed upon him, and was not granted or imposed upon this court or its members, to decide this question according to his judicial discretion. *Denver & Rio Grande R. R. Co. v. United States*, 124 Fed. 156, 160. And the question for this court in this case is not whether or not it or its members would have exercised his judicial discretion in the way the judge below exercised it, but it is only whether or not he improvidently, illegally or abusively exercised that discretion. *Stearns-Roger Mfg. Co. v. Brown*, 114 Fed. 939, 941, 942, and cases there cited; *Denver & R. G. R. R. Co. v. United States*, 124 Fed. 156, 160.

An indisputable rule for the guidance of the court below in the exercise of his sound judicial discretion in this case was and is that an interlocutory injunction maintaining the existing condition of the property may properly issue whenever the questions of law or fact to be ultimately determined in the suit are grave and difficult and injury to the moving party will be immediate, certain and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and may well be indemnified by a proper bond if the injunction is granted. *Georgia v. Brailsford*, 2 Dallas 402, 406, 407; *Magruder v. Belle Fourche Valley Water Users Assn.*, 219 Fed. 72, 82; *Denver & Rio Grande R. R. Co. v. United States*, 124 Fed. 156, 161; *City of Newton v. Lewis*, 79 Fed. 715,

718; *Allison v. Corson*, 88 Fed. 581, 584; *Stearns-Roger Mfg. Co. v. Brown*, 114 Fed. 939, 941; *Harriman v. Northern Securities Co.*, 132 Fed. 464, 476, 477, 480, 485; *Carpenter v. Knollwood Cemetery*, 188 Fed. 856, 857; *Wilmington City Ry. Co. v. Taylor*, 198 Fed. 159, 198; *Chew v. First Presbyterian Church*, 237 Fed. 219, 222; *American Smelting & R. Co. v. Bunker Hill & S. Min. & C. Co.*, 248 Fed. 172, 182. The district judge without doubt followed this rule. He took an ample indemnifying bond as a condition of the issue of the injunction and the question of jurisdiction alone seems to have been sufficiently grave and difficult in view of the circumstances surrounding the seizure by the defendants to warrant his action. In *Ex parte In the Matter of the United States, as Owner of Nineteen Barges and Four Towboats*, 263 U. S. 389, 393, the Supreme Court denied an application of the United States for a writ of prohibition to forbid the district judge below from enforcing his injunction against the defendants in the case in hand on the ground that the United States was a necessary party to this suit, and said:

"The merits of the case present interesting questions. The question of remedy is, however, the more insistent. Does the case justify it? Prohibition is a remedy of exigency and in exclusion of other process of relief. It is directed against unwarranted assumptions of jurisdiction or excesses of it. In some cases there may be instant judgment that such is the situation and the writ granted. In other cases there may be doubt and the writ denied. *Ex parte Muir*, 254 U. S. 522, 524. And doubt in the instant case would seem to be justified, for two district courts" (referring to the court below and the district court for the Northern District of West Virginia in *United States Harness Co. v. Graham*, 288 Fed. 929) "have decided that, under circumstances such as presented in this case, it does not involve or constitute a suit against the United States. And also the writ is to be denied if there be remedy against the action complained of by appeal."

Moreover, the United States acts and can act, contract and estop itself only by the acts, contracts and estoppels that are authorized or wrought by its officers or agents. In the opinion of the writer by their action in this case the United States made William M. Black the lessor and vendor of the property, vested the legal title to it in

him and the possession and equitable title in it in the plaintiff, represented and held him out as competent to make the terms of the lease and contract obligatory upon him and upon the property and enforceable by the courts in suits against him and his assigns without making the United States a party to such litigation. It does not appear and it is improbable that the plaintiff would ever have made this lease and contract with United States, reserving to itself the right to exempt itself and the property from the jurisdiction and power of the courts to enforce the terms of the contract obligatory upon it, and it seems to the writer that the United States and the lessor Black and his successors in interest are estopped by this lease and contract and their acts in placing and holding out the property as subject to its enforceable terms from preventing the plaintiff from protecting his rights and interests therein by suits against Black, the lessor, and his assigns on the ground that the United States is a necessary party thereto. If, on the other hand, the United States or the defendants, by the plea that the former is a necessary party to all suits to enforce or protect the rights of the plaintiff in this property, its possession, the lease and contract concerning it, and by the refusal of the United States to become a party to any such suits or to bring suit itself, may defeat all such suits without regard to their merits, the plaintiff is left practically remediless and his lease and contract become practically a deceitful sham. Again, the lease and contract of sale and the rights of all parties in interest thereunder arose from and evidence business or commercial transactions. In none of them was or is the United States acting as a sovereign in governing the Nation or the people of the Nation. The entire transaction and any interest it may have in it and the property involved as against the plaintiff is a commercial and business and not a governmental matter. As against him it stands in the relation of a private party divested of its privileges and immunities as a sovereign and, hence, of its privilege of exemption from suit against the party it made the lessor in this contract and amenable to the suits to enforce it. *United States v. Planter's Bank of Georgia*, 9 Wheaton 904.

Moreover, the jurisdiction of the court is not the only serious question in this case. On the day this suit was commenced and for more than a year before that day, the vessels were in the possession

of the plaintiff under the lease and contract of sale, which contained the provision that noncompliance by the lessee in the judgment of the lessor, William M. Black, Chief of Engineers, directed by the Secretary of War to represent the United States, with any of the terms or conditions of the lease would justify his terminating and returning the property to the lessor. It will be noticed that the only condition that would justify the termination of the lease and the return of the property to the lessor was the noncompliance by the lessee in the judgment of the lessor Black with the terms of the lease, while the defendants' claim to possession rests on noncompliance in the judgment of Honorable John W. Weeks, Secretary of War. The large value of the property subject to this lease and contract, the serious effect of the decision to be rendered by the judgment of Mr. Black leave no doubt in the mind of the writer that the plaintiff entrusted this decision to and relied upon the individual wisdom, experience, knowledge, just and deliberate fairness of Mr. Black. The record does not disclose any decision of this question of noncompliance by him or any consent or agreement by the plaintiff to substitute the judgment of Honorable John W. Weeks, Secretary of War, or of any other person or officer for that of Mr. Black; and it seems to the writer that the judgment of Mr. Weeks, the Secretary of War, was not binding upon the plaintiff, was unauthorized and ineffective. When two opposite parties agree to submit a controversy between them to the judgment of a chosen arbiter in whose fairness, wisdom, deliberation and discrimination they have confidence and to abide by his decision, the consent and agreement of both is indispensable to the substitution of another individual as arbiter in his place.

Again, the possession of this property, the optional right to purchase it on the terms prescribed by the contract, each of them constituted valuable property of the plaintiff vested in him under the contract. If the authority to take this property from the plaintiff when in his judgment the latter failed to comply with any of the terms of the lease and contract had been given to Honorable John W. Weeks, Secretary of War, as in the opinion of the writer it was not, the exercise of that authority and the taking of the possession and the property would have been conditioned by the fair, deliberate and judicial exercise of his judgment after reasonable opportunity

for the plaintiff to present the pertinent facts and to be heard concerning his compliance with the terms of the contract. An arbitrary declaration or decision of the Secretary that in his judgment the plaintiff had failed to comply with the terms, without prior notice to him of the Secretary's proposed consideration of that question, without opportunity for him to present to the Secretary his claim that he had complied and the facts and reasons upon which he based that claim and without thoughtful, fair and deliberate consideration of those facts and reasons before forming his judgment, it seems to the writer would not have warranted a judgment by the Secretary that the plaintiff had not complied with the terms of his contract. The plaintiff alleges in his complaint that no such notice or opportunity for him to present the facts and reasons why he had complied was given to him before the Secretary formed his alleged judgment, nor before his seizure of the property, although by the plaintiff's letter to the Secretary of March 8, 1923, he courteously requested such a hearing by the Secretary.

The 5th Amendment of the Constitution of the United States states: "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *". This provision of the Constitution forbids citizens, officers, courts, and the United States itself, from depriving any person of his property without due process. Notwithstanding the provision in the lease and contract that William M. Black, the lessor, on noncompliance, in his judgment, by the plaintiff with any of the terms of the lease and contract would be justified in terminating the lease and returning the property to the lessor, the writer is unable to bring his mind to the conclusion that the acts of the defendants in this case, the notice of Honorable John W. Weeks, Secretary of War, of March 3, 1923, that, in his judgment, the plaintiff had not complied with the terms of the lease and contract and his peremptory demand that the plaintiff surrender the property, his failure to give notice of or an opportunity for a hearing before him by the plaintiff on the question of the latter's compliance with the terms of the contract, either before or after the plaintiff by his answer to the Secretary's letter of March 3, 1923, requested such an opportunity and hearing by his letter of March 8, 1923, the sudden, coercing seizure and taking from the plaintiff of much of this property on Sunday and the

attempt to run it beyond the jurisdiction of the court below, constituted due process of law. To the writer they look more like an attempt to avoid or evade due process of law.

The questions of law and equity to which reference has now been made in the mind of the writer are grave and difficult and, in view of them, the judge below was required to and did exercise his judicial discretion in issuing the interlocutory injunction. On this appeal from the order for its issuance the only question judicable by this court is, whether or not the order for the injunction and the record in this case evidence an unlawful, improvident or abusive exercise of his sound judicial discretion. As has been said earlier in this opinion, the law imposed upon him the duty to exercise this discretion and the responsibility for its exercise and left him wide latitude for action within the rules prescribed for his guidance. Neither that discretion nor the exercise of it was entrusted to this appellate court or to either of its members and, in the opinion of the writer, it ought not to interfere with that exercise by the judge below to whom it was entrusted, unless an improvident, careless or unreasonable exercise of it, violative of the rules of law which should have guided his action, has been committed. *Blount v. Societe Anonyme Du Filtre, etc.*, before Circuit Judges, afterwards Justices of the Supreme Court, Taft and Jackson, 53 Fed. 98, 99, 100, 101; *Stearns-Roger Mfg. Co. v. Brown*. 114 Fed. 939, 941, 942. For the reasons stated above, the writer is not convinced that anything of this nature characterized the action of the court below in the granting of this injunction and he is unable to resist the conclusion that the order for it ought to be *Affirmed.*

Filed July 23, 1925.

141

(Decree.)

United States Circuit Court of Appeals, Eighth
Circuit.

May Term, A. D. 1925, Thursday, July 23, 1925.

John W. Weeks, Secretary of War of the United States, et al.,
Appellants,

vs.

Edward F. Goltra, Appellee.

Mr. Lon O. Hocker, Special Assistant to Attorney General,
for appellants.

Mr. Joseph T. Davis and Mr. Douglas W. Robert, for appel-
lee.

Upon consideration of the record in this case and the briefs
and arguments of counsel;

It is hereby Ordered, That the order for the interlocutory
injunction challenged by this appeal be and it is reversed, and
that this case be remanded to the court below for further
proceedings.

In view of the situation of the parties to this suit and of
the property involved therein, and of the probability that an
appeal to the Supreme Court from the decision of this court
herein will be taken;

It is further Ordered, that in case such an appeal is per-
fected within thirty (30) days after the filing of this order
and the indemnifying security, or its equivalent, against loss
on account of the order for the injunction, is continued, re-
newed, or otherwise kept in effect, until the decision of
142 the Supreme Court upon the appeal, the mandate of
this court to the court below shall be withheld and the
interlocutory injunction herein shall continue in force until
such decision is rendered and the order or orders of the Su-
preme Court pursuant thereto are put into effect.

July 23, 1925.

(Notice and Motion to modify order of July 23, 1925.)

Notice.

To Honorable John W. Weeks et al or their counsel:

You are hereby notified that the above named appellee will
present his motion, a copy whereof is hereto attached, to the

United States Court of Appeals for the Eighth Circuit at St. Paul, Minnesota, at the hour of 10 A. M. Monday, August 17th, 1925, or as soon thereafter as he can be heard by said Court.

St. Louis, Mo., Aug. 14th, 1925.

JOS. T. DAVIS &
D. W. ROBERT,

Attorneys for Appellee.

Copy of the above notice with copy of the within mentioned motion received this 14 day of August, 1925.

LON O. HOCKER,
Attorneys for Appellants.

Motion to Modify Order.

Comes now the above named appellee in the above entitled cause and moves the Court to modify the order of this Court made and entered herein as of July 23, 1925, in the manner hereinafter set forth, and to make an order approving
143 the new bond in the penal sum of \$25,000.00 filed by appellee this 14th day of August 1925, in the United States Circuit Court of Appeals for the Eighth Circuit as a sufficient bond in compliance with said order and for grounds therefor it is shown to the Court;

That said order provides, "that in case such appeal is perfected within thirty days after the filing of this order and the indemnifying security, or its equivalent against loss on account of the order for the injunction, is [continual] renewed, or otherwise kept in effect, until the decision of the Supreme Court upon the appeal, the mandate of this Court to the Court below shall be withheld and the interlocutory injunction herein shall continue in force until such decision is rendered and the order or orders of the Supreme Court pursuant thereto are put into effect."

That your said appellee herein has under the new rules of the Supreme Court, prepared his appeal by way of preparing a petition for a writ of certiorari and suggestions in support thereof in compliance with said rules, but is unable to perfect same so as to file with the Clerk of the Supreme Court until the Transcript of the Record of this Court is completed and certified and that this Transcript of Record of this Court cannot be completed and certified until the opinion of Judge Pollock and Symes are returned to the Clerk; that said opin-

ions have not yet been returned and since it has been learned that Judge Pollock is now spending his vacation in Canada it is very doubtful whether his opinion will be returned at an early date; that said thirty day period provided for in said order expires on August 23rd, 1925, and that sufficient time is not now available to prepare and file the said writ so as to enable the Supreme Court to review the same:

That under the new rules of the Supreme Court your appellee must file a petition for a writ of certiorari in order
144 to have the record in said cause certified to the Supreme Court, and that it will be at least October 5th, 1925, before same can be formally called up in the Supreme Court and then will require some time thereafter before said Supreme Court acts thereon:

That by reason of the foregoing facts your appellee herein shows to this Court that he cannot comply with said order as it is now of record; that he has been diligent in his compliance therewith and has made every effort to comply with said order.

Appellee in support of his motion herein further states that appellant held possession of the fleet under an ex parte hearing before, and order of, Justice Vandeventer of the Supreme Court of the United States, in vacation, in June of 1923, upon an application for a writ of prohibition filed by the Government against Hon. C. B. Faris, Judge of the United States District Court of the Eastern District of Missouri, which was case No. 23, "In the Matter of the Petition of the United States as Owner of Nineteen Barges and Four Towboats" filed to the October Term, 1923 of the Supreme Court of the United States; and did not return the fleet of towboats and barges to the appellee until September of the year 1924, under an order of the aforesaid Hon. C. B. Faris, Judge of the United States District Court.

That the condition of the towboats and barges as reported by Major John C. Gotwals, of the Engineering corps of the United States Army, made at the time said fleet was turned back to the appellee, under direction and order of the Honorable C. B. Faris, United States District Judge of the Eastern District of Missouri, was such it has required an expenditure to date of \$76,244.11 and additional commitments for the complete reconditioning of the towboat Missouri now in progress, the proximate sum of \$55,000.00. That appellee has,

145 since the time that said fleet was returned to him, been engaged in the rehabilitation of that portion of the said towboats and barges requiring reconditioning. That since District Judge Faris in September, 1924 ordered the boats returned to the appellee and permitted and ordered their operation, the appellee has been operating the same continuously to their full capacity in the transportation of all kinds of grain, ore, and coal, and has commitments for future full capacity operations of this fleet of towboats and barges.

That to allow said order of this Court entered on the 23rd day of July, 1925, to remain as it is would deprive your appellee of his private and property rights, and would be a failure to carry out the spirit and intent of this Court in making and entering said order.

Appellee further states that he will complete said writ of certiorari, file same and cause the Supreme Court to act thereon.

Wherefore, your appellee moves that said order be modified so as to provide that in case said appellee prepares and files a petition for a writ of certiorari within the time specified under the rules of the Supreme Court to-wit, ninety days from the date of the original order herein, to-wit, July 23rd, 1925, the mandate of the Court below shall be withheld and the interlocutory injunction herein shall continue in force until such decision is rendered and the order or orders of the Supreme Court pursuant thereto are put into effect, and that the bond filed herein in the United States Circuit Court of Appeals for the Eighth Circuit be approved as a sufficient bond hereunder and in compliance with said order.

JOS. T. DAVIS,
D. W. ROBERT,
Attorneys for Appellee.

146 State of Missouri,
City of St. Louis—ss.

Edward F. Goltra, being duly sworn upon his oath says that the facts stated in the above and foregoing motion are true to the best of his knowledge and belief.

EDWARD F. GOLTRA.

Subscribed and sworn to before me this 14th day of August, 1925.

My term expires January 10th, 1928.

(Seal)

ETTA MANN, Notary Public.

Western Union Telegram

St. Louis, Mo. Aug. 10, 1925.

Hon Walter H. Sanborn,
U. S. Circuit Judge,
Epsom, New Hamp.

Counsel for Goltra in Weeks Goltra case ready to take case to Supreme Court but cannot proceed until Judges Pollock and Symes return opinions stop Under New Supreme Court Rules Counsel proceeding by certiorari instead of appeal as order provides stop Order provides appeal be perfected by August 23rd and bond continued to stay mandate stop Unable to perfect appeal by then for above reason stop Counsel has certified copy of bond filed in District Court to show it is continuing bond stop Counsel suggests new or modified order approving bond in compliance and extension of time to stay mandate in accordance with above stop Please advise.

Clerk.

147 Paid Commercial Rate.
Charge to Account of
E. E. Koch, Clerk.
308 Custom House.

Western Union Telegram

St. Louis, Mo. Aug. 10, 1925.

Hon. John C. Pollock,
U. S. District Judge,
Kansas City, Kan.

Counsel for Goltra in Weeks Goltra case ready to take case to Supreme Court but cannot proceed until opinion is finally printed stop Did you receive proof and when will same be returned to me after revision by you stop Time growing

short under thirty day order for appeal made by Court stop
Wire answer.

Clerk.

Paid Commercial Rate.
Charge to Account of
E. E. Koch, Clerk,
308 Custom House.

Western Union Telegram

St. Louis, Mo. Aug. 10, 1925.

Hon. J. Foster Symes,
U. S. District Judge,
Denver, Colo.

Counsel for Goltra in Weeks Goltra case ready to take case
to Supreme Court but cannot proceed until opinion is finally
printed stop Did you receive proof and when will same
148 be returned to me after revision by you stop Time
growing short under thirty day order for appeal made
by Court stop Wire answer.

Clerk.

Paid Commercial Rate.
Charge to Account of
E. E. Koch, Clerk,
308 Custom House.

Epsom NH Aug. 10 1925

Hon E. Koch
Clerk U. S. Circuit Court of Appeals
St. Louis, Mo.

I cannot make needed orders in Goltra case here tell law-
yers to apply on notice to [apponents] to Court of Appeals
at St. Paul through Judge Booth of Minneapolis.

WALTER H. SANBORN
221p

The Western Union Telegraph Company,

Notice of Non-Delivery of Telegram.

904 Olive St Aug 10 1925 192

M E. E. Koch 184

308 Post Office St Louis Mo

Your telegram dated Aug 10 To Hon John C. Pollack Kansas City Kans is undelivered.

Reason: On vacation San Louei Moon River Ont

149 If you desire to communicate with this office by telephone in regard to the above telegram, call Olive 4321 and ask for extension No. 14.

Changes in the address will be charged for at the usual rates.

THE WESTERN UNION TELE-
GRAPH COMPANY,

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Aug. 14, 1925.

(Order modifying Order of July 23, 1925.)

May Term, 1925.

Monday, August 17, 1925.

Now on this 17th day of August, 1925, after due notice to the above named Appellants, comes the above named Appellee by his Counsel in open court and presents his verified motion to modify the order of this Court made and entered in this court on the 23rd day of July, 1925, and also presents his bond in the penal sum of \$25,000 as in compliance with the orders of this court for approval.

After considering said motion and bond, and being fully advised,

It is Ordered that the order of this court, made and entered herein on the 23rd day of July, 1925, be and the same is hereby modified so that the same is now as follows:

That if the above named appellee perfects and files his petition for a writ of certiorari in the Supreme Court of the United States, for a writ directed to the United States Circuit Court of Appeals for the Eighth Circuit, requesting said Circuit Court of Appeals to certify to that court the record

and opinions in the above entitled cause, within ninety
150 days from the above order of July 23, 1925, and in all
other respects complies with the rules of the Supreme
Court relative thereto, and the indemnifying security or its
equivalent against loss on account of the order for the in-
junction, is continued, renewed, or otherwise kept in effect,
until the decision of the Supreme Court upon the appeal by
said writ of certiorari, the mandate of this court to the court
below shall be withheld and the interlocutory injunction here-
in referred to shall continue in full force and effect until
such decision is rendered and the order or orders of the Su-
preme Court pursuant thereto are put into effect, and

Be it further Ordered that the said Appellee's bond in the
penal sum of \$25,000 dated August 15, 1925, and filed in this
cause be and the same is hereby approved as in full compli-
ance with the foregoing orders of this court.

August 17, 1925.

(Bond to continue in force temporary injunction.)

Know All Men By These Presents: That we, Edward F.
Goltra, as principal, and the Fidelity & Deposit Company of
Maryland, as surety, are held and firmly bound unto John
W. Weeks, T. Q. Ashburn and James E. Carroll in the sum
of Twenty Five Thousand Dollars, for the payment of which,
well and truly to be made, we bind ourselves, our heirs, ex-
ecutors, and administrators, jointly and severally, by these
presents.

Sealed with our seals and dated at St. Louis this 14th day
of August, A. D. 1925.

The Condition of the above obligation is such, That where-
as Edward F. Goltra on the 4th day of September, A.
151 D. 1924 obtained a restraining order and injunction
against John W. Weeks, T. Q. Ashburn and James E.
Carroll, and

Whereas the said Edward F. Goltra on the 15th day of Sep-
tember A. D. 1924 executed as principal, and the Fidelity and
Deposit Company of Maryland as surety, their bond to John
W. Weeks, T. Q. Ashburn and James E. Carroll in the sum
of Twenty Five Thousand Dollars, which bond was filed and
approved on the 15th day of September, 1924 by the Honor-
able C. B. Faris, Judge of the United States District Court

for the Eastern District of Missouri in the case of Edward F. Goltra, Plaintiff, vs. John W. Weeks, Secretary of War of the United States, et al., Defendants, copy of which bond is hereto attached; and

Whereas on the 23rd day of July, 1925 the United States Circuit Court of Appeals for the Eighth Circuit, in the case of John W. Weeks, Secretary of War of the United States, et al, Appellants, vs. Edward F. Goltra, Appellee, which case is No. 6871 of said Court, entered an order therein, which order is as follows:

"It is further ordered, that in case such an appeal is perfected within thirty (30) days after the filing of this order and the indemnifying security, or its equivalent, against loss on account of the order for the injunction, is continued, renewed, or otherwise kept in effect, until the decision of the Supreme Court upon the appeal, the mandate of this court to the court below shall be withheld and the interlocutory injunction herein shall continue in force until such decision is rendered and the order or orders of the Supreme Court pursuant thereto are put into effect."

And whereas said Edward F. Goltra, in compliance with said order and the rules of the Supreme Court of the
152 United States, is preparing and will file his petition for a writ of certiorari in order to have the record in said cause certified to the Supreme Court;

Now, if the said Edward F. Goltra shall continue and keep in full force and effect said above-described original bond, filed and approved on the 15th day of September, 1924 in the United States District Court for the Eastern District of Missouri, in the case of Edward F. Goltra, Plaintiff vs. John W. Weeks, Secretary of War of the United States, et al, Defendants, which is hereby accordingly done, until said cause is finally determined by the Supreme Court of the United States, and its orders and decisions are put into effect; and if the said Edward F. Goltra shall pay all damages that may be occasioned by said restraining order or injunction, and abide by the decision which shall be made therein and pay all sums of money, damages and costs that shall be adjudged against him if the injunction or restraining order be dissolv-

ed, then the above obligation to be void, otherwise, to be and remain in full force and effect.

(Seal) EDWARD F. GOLTRA, Principal,
FIDELITY & DEPOSIT COMPANY
OF MARYLAND,
By Emmett M. Myers,
Attorney in fact.

Approved this 17th day of August, 1925.

WILBUR F. BOOTH,
U. S. Circuit Judge.

State of Missouri,
City of St. Louis—ss.

On this 14th day of August, 1925, before me appeared
153 Emmett M. Myers, to me personally known, who being
by me first duly sworn, did say that he is Attorney-in-
fact of the Fidelity and Deposit Company of Maryland, a
corporation organized under the laws of the State of Mary-
land, and that the seal affixed to the foregoing instrument is
the corporate seal of said corporation; and that said instru-
ment was signed and sealed on behalf of said corporation by
authority of its Board of Directors and the said Emmett M.
Myers acknowledged said instrument to be the free act and
deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and
notarial seal, the day and year first above written.

(Seal) GEO. R. SCHOEN,
Notary Public,
City of St. Louis, Mo.

My term expires May 26, 1929.

* * * *

(Certified copy of Power of Attorney issued by Fidelity &
Deposit Company of Maryland to Mr. Emmett M.
Myers attached to original bond.)

Know All Men By These Presents: That we, Edward F.
Goltra, as principal and the Fidelity & Deposit Company of
Maryland, as surety, are held and firmly bound unto John
W. Weeks T. Q. Ashburn and James E. Carroll in the sum of
Twenty Five Thousand Dollars, for the payment of which,
well and truly to be made, we bind ourselves, our heirs, ex-

ecutors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated at St. Louis this 15th day of September, A. D. 1924.

154 The condition of the above obligation is such, That
whereas Edward F. Goltra on the 4th day of September, A. D., 1924, obtained a restraining order and injunction against John W. Weeks, T. Q. Ashburn and James E. Carroll, Now, if the said Edward F. Goltra shall pay all damages that may be occasioned by said restraining order or injunction, and abide the decision which shall be made therein, and pay all sums of money, damages and costs that shall be adjudged against him if the injunction or restraining order be dissolved, then the above obligation to be void, otherwise to be and remain in full force and virtue.

(Signed) EDWARD F. GOLTRA,

FIDELITY & DEPOSIT
COMPANY OF MARY-
LAND,

By Emmett M. Myers (Seal)

Approved this 15th day of September, 1924.

(Signed) C. B. FARIS, Judge.

State of Missouri,
City of St. Louis—ss.

On this 15th day of September, 1924, before me appeared Emmett M. Myers, to me personally known, who being by me first duly sworn, did say that he is Attorney-in-fact of the Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation; and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors and the said Emmett M. Myers acknowledged said instrument to be the free act and deed of said corporation.

155 In Testimony Whereof, I have hereunto set my hand
and notarial seal, the day and year first above
written.

(Seal)

(Signed) GEO. R. SCHOEN,
Notary Public, City of St. Louis, Mo.

My term expires May 27, 1925.

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.

I, Jas. J. O'Connor, Clerk of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the writing hereto attached is a true copy of Bond for Temporary Injunction filed September 15th, 1924 in Case No. 6339 of Edward F. Goltra, Plaintiff, vs. John W. Weeks, et al., Defendants, as fully as the same remains on file in said case in my office.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Court, at office in the City of St. Louis, in the Eastern Division of said District, this 28th day of July in the year of our Lord nineteen hundred and twenty-five.

(Seal) JAS. J. O'CONNOR,
Clerk of said Court,
By Margaret M. Boyd, Deputy.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Aug. 17, 1925.

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(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth
Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein John W. Weeks, Secretary of War of the United States, et al., were Appellants and Edward F. Goltra was Appellee, No. 6871, as full,

true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-fifth day of August, A. D. 1925.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 26, 1925

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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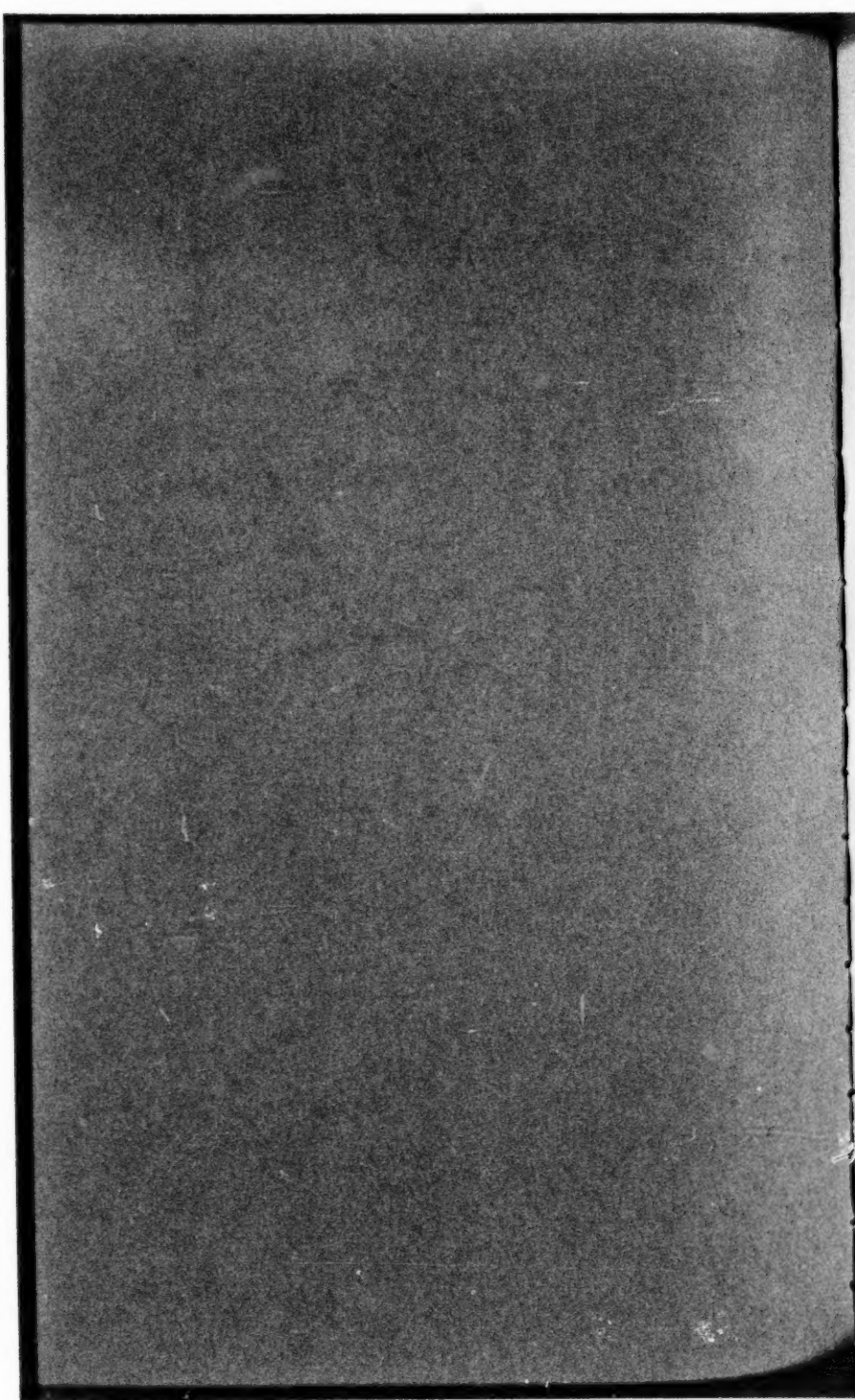
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IN THE

Supreme Court of the United States.

EDWARD F. GOLTRA,

Petitioner,

vs.

JOHN W. WEEKS, Secretary of
War of the United States, COL.
T. Q. ASHBURN, Chief Inland
& Coastwise Waterways Service
of the United States, and JAMES
E. CARROLL, United States Dis-
trict Attorney,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI DIRECTED
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.**

To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:

Your petitioner, Edward F. Goltra, respectfully presents to this Court this, his petition, for a Writ of Certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit, requiring said Court and the Clerk thereof to certify to this Court the record and proceedings of the case in said court wherein your petitioner was Respondent, and the Respondents, John W. Weeks, Secretary of War of the United States; Col. T. Q. Ashburn,

Chief Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney, were Appellants, together with the opinions therein for review and determination of said cause by this Court.

Said cause was heard in the United States Court of Appeals for the Eighth Circuit, by Sanborn, Circuit Judge, and Pollock and Symes, District Judges, on appeal from the United States District Court for the Eastern District of Missouri upon a decree and an order rendered and entered, after a hearing, granting a temporary restraining order and mandatory injunction against the respondents herein.

The opinion of the Circuit Court of Appeals was delivered by Pollock, District Judge, and was concurred in by Symes, District Judge, in a separate opinion. Sanborn, Circuit Judge, delivered a dissenting opinion.

The order of Court is as follows:

"It is hereby ordered: That the order for the interlocutory injunction challenged by this appeal be and it is hereby reversed and that this case be remanded to the court below for further proceedings.

"In view of the situation of the parties to this suit and of the property involved herein, and of the probabilities that an appeal to the Supreme Court from the decision of this Court herein will be taken;

"It is further ordered: That in case such an appeal is perfected within thirty days after the filing of this order and the indemnifying security, or its equivalent against loss on account of the order for the injunction, is continued, renewed, or otherwise kept in effect, until the decision of the Supreme Court upon the appeal, the mandate of this Court to the Court below shall be withheld and the interlocutory injunc-

tion herein shall continue in force until such decision is rendered and the order or orders of the Supreme Court pursuant thereto are put into effect."

The reasons relied on for the allowance of this writ are:

First: The majority opinion of said Circuit Court of Appeals has decided important questions of law in a way untenable and in conflict with applicable decisions of this Court and in conflict with the weight of authority, to-wit:

(a) That this suit for an injunction against the Secretary of War and his subordinates to restrain them, as individuals, from committing illegal and unauthorized acts of seizing the towboats, barges and other property and commanding the return of the property already taken, which has been and was legally in the possession and control of your petitioner, could not be maintained, and

(b) That such a suit was one, in effect, against the United States which could not be maintained.

(c) That the Secretary of War had the right, in his judgment and discretion, to, arbitrarily, terminate said contract of lease and option to purchase, without affording the lessee an opportunity to be heard.

(d) That the judgment of the Secretary of War is not subject to judicial inquiry, decision, or review.

(e) That by reason thereof the respondents, John W. Weeks, as Secretary of War, Col. T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney, were justified in seizing, without legal proceedings, without notice, by coercion, and force of men and arms, said towboats and barges then in the possession and control of petitioner.

(f) That although the Government had, as here disclosed, entered into a commercial enterprise and was interested as a trader in a business venture for profit, still it retained its immunity from suit as a sovereign in a governmental capacity.

(g) By deciding and holding the contract of lease to be a contract with the Government and that the property was and is the property of the United States in its sovereign capacity, although the contract of lease was made with Edward F. Goltra by "Major General Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor," and designated in said lease as "party of the first part," and throughout refers to "him" as the lessor, and relates to and also recites the allotment of \$3,860,000 to said Chief of Engineers by the United States Shipping Board Emergency Fleet Corporation for the construction of said fleet.

(h) By interpreting clause 8 of said contract of lease and option as a forfeiture clause with power in the Secretary of War, in his judgment, to declare said contract terminated, and to take, arbitrarily and by force, said property.

Second: The majority opinion of said Court has decided an important question of law in a way untenable and in conflict with the Fifth Amendment of the Constitution of the United States: "No person shall * * * be deprived of life, liberty, or property, without due process of law," to-wit: sustaining respondents' arbitrary seizure of your petitioner's property under circumstances as set forth in Judge Sanborn's dissenting opinion:

"Notwithstanding the provision in the lease and contract that William M. Black, the lessor, on non-compliance, in his judgment, by plaintiff with any of

the terms of the lease and contract, would be justified in terminating the lease and returning the property to the lessor," is no grounds for "the conclusion that the acts of the defendants in this case, the notice of Honorable John W. Weeks, Secretary of War, of March 3rd, 1923, that, in his judgment, the plaintiff had not complied with the terms of the lease and contract and his peremptory demand that the plaintiff surrender the property, his failure to give notice of or an opportunity for a hearing before him by the plaintiff on the question of the latter's compliance with the terms of the contract, either before or after the plaintiff by his answer to the Secretary's letter of March 3rd, 1923, requested such an opportunity and hearing by his letter of March 8, 1923, the sudden, coercing seizure and taking from the plaintiff of much of this property on Sunday, and the attempt to run it beyond the jurisdiction of the Court below, constituted due process of law."

Third: The majority opinion of said court has decided important questions of federal law as set forth in the foregoing paragraphs which should be settled by this Court.

In this behalf your petitioner states the following facts:

1. During the war between the United States and Germany, as a war emergency, "the United States Shipping Board Emergency Fleet Corporation allotted to the Chief of Engineers the sum of \$3,860,000 for the construction of a fleet of towboats and barges for the primary purpose of transporting * * * iron and coal to and from St. Louis, Missouri." At the close of the war said towboats (four in number) and barges (nineteen in number) were in course of construction under contract with the Chief of Engineers of the United States Army. Said towboats and barges were useless as a war emergency in time of

peace, and were of uncertain value for private business undertakings until successfully demonstrated and experimented with.

2. After some negotiations a contract of lease with option to purchase was entered into between William M. Black, Chief of Engineers, United States Army, and your petitioner, on May 28th, 1919.

3. Said contract of lease and option to purchase described the parties as follows:

"This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra of the City of St. Louis, State of Missouri, hereinafter designated as the lessee, his heirs, executors and administrators, party of the second part."

4. Said contract of lease and option to purchase was executed as follows:

"In witness whereof the parties aforesaid have hereunto placed their signatures of the date first hereinbefore written.

Witnesses:

William M. Black (Seal)
John Stewart, Major General, Chief of Engineers U. S. Army (First
Lt. Col of Engineers Party)."

_____, Edward F. Goltra (Seal)
Lt. Col., Engrs. (Second Party)."

As to

5. At the end of the said contract of lease and option to purchase are the following notations:

“The insertion of the words ‘three or’ in the thirteenth and nineteenth lines of page 2, the seventh line of page 3, and the fifteenth line of page 7 are correct and were made before the contract was completed.

William M. Black,
Maj. Gen., Chief of Engrs.,
First Party.

Edward F. Goltra,
Second Party.

“It is further understood and agreed between the said William M. Black, Chief of Engineers, United States Army, and Edward F. Goltra, parties of the first part and of the second part, respectively, of the above contract, that the number of towboats to be supplied under the above contract, denominated ‘three or four’ therein, shall be at least three, and that a fourth shall be supplied only in the event that four suitable towboats of the general type and power described in the request for proposals now being canvassed for four towboats for the upper Mississippi River can be obtained with the funds available as specified in the second whereas of the above contract, and not otherwise.

Witness:

Lt. Col. of Engineers.
James M. Hoffman,
Capt., Engrs., U. S. A.

William M. Black,

Edward F. Goltra.”

6. On May 26th, 1921, a supplemental contract for the erection of unloading facilities was entered into. The beginning of said supplemental contract is as follows:

“Whereas, on the twenty-eighth day of May, 1919,

a contract was entered into between Major General W. M. Black, Chief of Engineers, U. S. Army, who, as well as his legally appointed successor, is hereinafter designated as the lessor, representing the United States of America, of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri."

* * * * *

"Now, therefore, the said contract is, by this Supplemental Agreement between Major General Lansing H. Beach, Chief of Engineers, U. S. Army, and the said contractor, on this 26th day of May, 1921, hereby modified in the following particulars, but in no others:"

7. The supplemental contract was executed as follows:

"This supplemental agreement shall be subject to the approval of the Secretary of War.

"In witness whereof the parties aforesaid have hereunto placed their signatures at the time of execution of this agreement.

Witnesses:

P. J. Dempsey,	Lansing H. Beach,
As to	Major General, Chief of
Thomas M. Robins,	Engineers.
Major, Corps of Engineers.	

As to	Edward F. Goltra,
Approved May 27, 1921	J. M. Wainwright,
	Assistant Secretary of
	War."

8. Throughout said contracts the lessor is referred to in the personal pronoun, and he is referred to as the party to oversee and supervise the operating conditions, to approve of the insurance companies, to determine the bond, to designate the depository for funds, to inspect the fleet, the accounts, expenses and operating costs, to appoint one

appraiser in the event the option to purchase is exercised and to have said fleet returned to him upon termination of the lease.

9. Part of the consideration set forth in the said contract of lease and option to purchase is as follows:

"Whereas the said lessee has entered into various engagements and undertakings to increase the pig iron supply as a war measure, which may have created, and according to the contention of the lessee did create, obligations on the part of the United States to the said lessee, but which he entirely releases and discharges in part consideration of this lease, which engagements, undertakings and lease are in furtherance of the original design for the assembling of coal and iron at St. Louis, Missouri, and for the increase of pig iron facilities:"

10. Part of the consideration set forth in the said supplemental agreement is as follows:

"The lessee will, at his own expense, within eight (8) months from the date thereof, provide the necessary tract of land and runway on which the unloading facilities are to be erected, stand and operate, said tract to be selected by the lessor, subject to the approval of the lessee, and said runway to be built according to plans submitted by lessee and approved by the lessor."

11. The contract of lease is for a term of five (5) years from date of delivery of towboats and barges to the lessee.

12. The option to purchase clause of the contract reads as follows:

"5. Within three months prior to the expiration

of the lease, or of any period of renewal, or sooner if so desired by the lessee, a board of three persons shall be appointed, one to be designated by the lessor, one by the lessee, and one by the said two members, unless they shall fail to agree, in which case the third member shall be appointed by the Secretary of War, all of whom shall be familiar with the construction and cost of river vessels of steel and with the current market values thereof to appraise the value of the said fleet at that time, and the said lessee shall be given the option of purchasing the fleet upon the following terms:"

13. The clause relative to the use and operation of the fleet and the rates to be charged reads as follows:

"2 (a) that the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made provided the Secretary of War consents to such use other than as a common carrier."

14. The inspection clause under which the respondents herein claim the right to terminate the contracts reads as follows:

"8. The lessor reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions in this lease are fulfilled, and that the crews and other employes are promptly

paid, monthly or oftener; and non-compliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels."

15. The above clause eight (8) is referred to as the inspection clause in the Supplemental Agreement as follows:

"The terms of the original lease as to net earnings (paragraph 3), appraisement and option of purchase, and conditions of purchase (paragraph 5), method of payment in the event of purchase (paragraph 6), inspection (paragraph 8), shall govern so far as applicable and pertinent to the said unloading facilities."

16. Said towboats and barges were not completed and were not delivered to your petitioner herein by the lessor (Chief of Engineers of the United States Army) until July 15th, 1922. Prior to July 15th, 1922, your petitioner complied with the terms and conditions of said contract of lease and option to purchase in the matter of purchasing insurance and a \$200,000 bond as therein provided, and complied with the terms and conditions of said supplemental contract by purchasing the tract of land designated by the Chief of Engineers for the erection of said unloading facilities.

17. On July 15, 1922, your petitioner was put in possession and control of said towboats and barges and unloading facilities under said contracts.

18. The unloading facilities were not completed until sometime thereafter and were not completed on March

25th, 1923, the date of seizure, but same had been delivered and were in the possession and under the control of your petitioner.

19. After delivery of the fleet the same had to be tested on the Mississippi River to determine feasibility; alterations and additions had to be made, and further tests made; the tests, experiments, changes, alterations and additions consumed considerable time and caused your petitioner to expend about \$40,000 therefor.

20. The navigation season on the Mississippi River closes about December 15th and again opens about the first of March.

21. Your petitioner could not secure commodities to transport at rates equal to the rail or all rail rates. No traffic moves, by barges, on the Mississippi river at rail or all rail rates.

22. Under the terms of the contract of lease, paragraph 2 (a) thereof, your petitioner was restricted to the operation of said towboats and barges in transporting commodities to rates "not in excess of prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War." The Secretary of War, thereunder, exercised, kept and maintained control over the rates to be charged for transportation.

23. Your petitioner, anticipating the delivery of said towboats and barges to him, on March 4, 1921, secured from the Secretary of War written authority to make and fix the rate for transporting all commodities by said towboats and barges at 80 per cent of the rail rates.

24. Acting under said authority to make and fix a rate at 80 per cent of the all rail rate, and anticipating the delivery of said towboats and barges, your petitioner solic-

ited and secured commitments for a large tonnage of various commodities to be transported by said towboats and barges on the Mississippi River and its tributaries.

25. Subsequent thereto, the respondent herein, John W. Weeks, became Secretary of War of the United States.

26. Thereafter the respondent herein, John W. Weeks, as Secretary of War, on May 6th, 1922, withdrew and cancelled said rate of 80 per cent of the rail tariff—and only authorized to operate at regular rail rates. On May 25, 1922, the Secretary of War modified this by authorizing a rate of 80 per cent of the rail rate to certain specific and limited commodities so as not to compete with the Mississippi-Warrior River Service, a barge transportation business engaged in by the United States under the Secretary of War. Under this limited authorization your petitioner could not operate.

27. During the short period of time remaining after making tests and alterations until the closing of the navigation season, December 15, 1922, and under the aforementioned limited rate authority, your petitioner did transport certain shipments of coal and cement.

28. On Sunday, March 4, 1923, without notice, warning or an opportunity to be heard, the respondent, John W. Weeks, Secretary of War, through respondent, Col. T. Q. Ashburn, Chief Inland and Coastwise Waterways Service (the officer in charge of the Government's Mississippi-Warrior River Service) served notice on your petitioner in Washington, D. C., declaring said contract of lease and option to purchase, and the supplementary agreement terminated and demanded the delivery of said property over to said Col. Ashburn immediately, upon the grounds that your petitioner had not operated said fleet as a common carrier.

29. To said notice was attached "memorandum for Col. Ashburn" wherein said Secretary of War directed said Col. Ashburn, in the event your petitioner failed to comply with said demand, as follows:

"In the event of his failure or refusal to make delivery of the property demanded, you will apply to the United States District Attorney at St. Louis, requesting the institution of legal proceedings for the recovery of said property."

30. Under date of March 8, 1923, your petitioner, in writing, refused to comply with said demand, and therein stated:

"To do so would deprive me, without any notice whatever, or opportunity to be heard, of rights and property lawfully acquired at a very large expenditure by me of time and money. I have, in face of most unjust interference and restrictions fully complied with all of the terms of my contract, and, further, I have complied with every demand or requirement made of me by either you or the Chief of Engineers of the United States, the lessor named in my contract.

"The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has in fact no substantial basis on which to rest. This I believe will be fully demonstrated to you if I am granted a fair and impartial hearing to which, as a citizen, I am entitled, and which, in fairness and justice, I now request."

31. No reply was made to your petitioner's aforesaid reply.

32. On Sunday morning between nine and ten o'clock, March 25, 1923, without notice or warning, said respond-

ent, Col. T. Q. Ashburn, accompanied by officers of the Government's Mississippi-Warrior River Service, and a large force of men, on one of its steamers, through threats, coercion, force of arms and force of men, seized the fleet of towboats and barges and immediately removed the same toward the State of Illinois shore side, and down the Mississippi River to avoid the jurisdiction of the United States District Court for the Eastern District of Missouri.

33. On said same Sunday, as soon as your petitioner was advised by his representatives of said seizure, he caused the Bill of Complaint herein to be hurriedly prepared and presented to the Judge of the United States District Court of the Eastern District of Missouri, upon which a Temporary Restraining Order and Order to show cause was issued.

34. To this said respondents filed a motion to dismiss and to quash the temporary restraining order, and also a "Motion and Suggestion of the Attorney General of the United States."

35. On April 30, 1923, said United States District Court for the Eastern District of Missouri overruled said motions.

36. Thereupon respondents herein in the name of the Attorney General of the United States made application to the Supreme Court of the United States, October Term, 1923, for a Writ of Prohibition, which said proceeding was entitled "In the matter of the Petition of the United States of America, as owner of Nineteen Barges and Four Towboats—No. 23 Original." Said writ was denied.

37. Thereafter a hearing for a temporary restraining order and mandatory injunction was had in said United States District Court for the Eastern District of Missouri,

after which the following order was made and entered, Sept. 4, 1924:

"Ordered that said defendants, their agents and servants and all those acting by or through or for them be and hereby are commanded and ordered forthwith to restore to the plaintiff herein at the port of St. Louis, Missouri, all of said towboats, barges, and other facilities and appliances heretofore seized by said defendants, subject to an accounting to be had for any damage resulting from the use and possession of said boats, barges, tools, and appliances since the taking. It is further

"Ordered, that plaintiff, forthwith, give a penal bond in the sum of Twenty-five Thousand Dollars (\$25,000.00) and

"That said temporary restraining order and mandatory injunction remain in full force and effect until final hearing of this cause and until further order of this Court."

38. Thereupon respondents herein appealed from said temporary restraining order and mandatory injunction to the United States Circuit Court of Appeals for the Eighth Circuit.

The questions and propositions of law involved in this case are substantially as follows:

1. The majority opinion of the United States Circuit Court of Appeals for the Eighth Circuit has decided an important question of law in a way untenable and in conflict with the weight of authority in this, to-wit: Said opinion holds that in this cause, wherein the Major General, Chief of Engineers of the United States Army, leased, by authority of law, nineteen barges and four towboats to Edward F. Goltra, and which said barges and

boats had been constructed and paid for out of a fund of \$3,860,000 which had been allotted to the said Chief of Engineers by the United States Shipping Board Emergency Fleet Corporation, and which barges and boats were in the possession of the said Goltra under said lease and under which lease said Goltra had certain options or rights to purchase said barges and boats, and under the provisions of said lease said Goltra had laid out and expended large sums of money, that the Secretary of War had the right and discretion to declare said lease at an end and to seize the said barges and boats and to deprive the said Goltra of his rights in them and to them without a proceeding in court, though the said Goltra denied and disputed said right or discretion and that though so disputing said right that said Goltra could not maintain a suit for an injunction against the Secretary of War and his subordinates (who had been directed to begin legal proceedings), individually to restrain them from committing the illegal act of seizing said barges and boats and that such a suit was one in effect against the United States which could not be maintained.

In the case of *United States v. Lee*, 106 U. S. 109, this Honorable Court held:

“In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the Government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him, when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Chief Justice Marshall says, to examine whether this authority is rightfully assumed, is the exercise of jurisdiction and must lead to the decision of the merits of the question. The objection

of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption, that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

“But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?

“Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class.

“Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the Courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without any lawful authority, without any process of law and without any compensation, because the President has ordered it and his officers are in possession?

“If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulate liberty and the protection of personal rights. * * *

And in the case of the State of Colorado v. Roger W. Toll, decided by this Honorable Court May 11, 1925, the Rocky Mountain National Park, property of the United States, was in the possession of the superintendent, Toll,

who had been appointed by the Government, it was held that an injunction suit could be maintained against the said superintendent individually, the opinion stating:

“The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do, and that derogate from the quasi sovereign authority of the state. There is no question that a bill in equity is a proper remedy, and that it may be pursued against the defendant without joining either his superior officers of the United States.”

2. The concurring opinion of Judge Symes states:

“In conclusion it must be remembered that the whole object of Weeks in leasing these boats was to have them operated for the benefit of shippers in the Mississippi Valley; that Goltra attempted only two trips to the river and then tied them up at the wharf in St. Louis. The shipping public was complaining of the lack of service so the Government took possession in order to turn them over to a lessee who would give service to the public.”

Thus it is stated that the Government had entered into a commercial enterprise and was interested as a trader in a business venture for profit, yet still retained its immunity from suit as a sovereign in a governmental capacity. It has therefore decided an important question of law in a way untenable and in conflict with the applicable decisions of this Honorable Court, and the great weight of authority.

In the case of *Bank of the United States v. Planter's Bank of Georgia*, 9 Wheat. 904, this Court said:

“It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and

takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.' ”

These words are quoted and followed in many cases, e. g.:

Bank of Kentucky v. Wister, 2 Pet. 318;
 Briscoe v. Bank of Ky., 11 Peters 256, 323;
 Louisville R. R. v. Letson, 2 How. 304, 308;
 South Carolina v. United States, 199 U. S. 43.

3. The majority opinion decides a federal question in a way in conflict with the applicable decision of this Honorable Court in the case of Sloan Shipyards Corporation v. United States Shipping Board, 258 U. S. 549, in that the Circuit Court of Appeals holds that although the contract of lease made with Edward F. Goltra by “Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor,” and designated in said lease as “party of the first part” and signed “William M. Black, Major General, Chief of Engineers, U. S. Army (First Party),” and the supplemental agreement reading “whereas, on the twenty-eighth day of May, 1919, a contract was entered into between Major General W. M. Black, Chief of Engineers, U. S. Army, who, as well as his legally appointed successor, is hereinafter designated as the lessor” and signed “Lansing H. Beach, Major General, Chief of Engineers,” which contract relates to and cited the allotment of \$3,860,000 to the Chief of Engineers by the United States Shipping Board Emergency Fleet Corporation for the construction of the barges and boats leased to the said Goltra, the Government was the owner of said barges and boats, and

that any suit against any officers of the Government with relation to said barges and boats would be construed to be a suit against the Government.

In the case of Sloan Shipyards Corporation v. United States Shipping Board, 258 U. S. 549, this Honorable Court said:

“This contract was made on February 1, 1919, when the character of the Fleet Corporation had been more fully developed and determined than in the previous case, and purported to be made with the Fleet Corporation—a corporation organized and existing, etc. (hereinafter called the ‘Corporation’) representing the United States of America, party of the second part. Throughout the contract the undertakings of the party of the second part are expressed to be the undertakings of the Corporation, and it is this Corporation and its officers that are to be satisfied in regard to what is required from the Iron Works.

“The whole frame of the instrument seems to us plainly to recognize the Corporation as the immediate party to the contract.”

4. The opinion holds that the Secretary of War, not a party to the contract and not designated as the lessor, had the right, arbitrarily, to declare the lease contract forfeited. In so doing it decided a question in a manner directly in conflict with the decision of this Honorable Court in the case of Sloan Shipyards Corporation v. United States Shipping Board, 258 U. S. 549, cited in the preceding paragraph.

Your petitioner in the brief accompanying this petition will more particularly elaborate upon the foregoing questions.

Your petitioner presents herewith a certified copy of the

entire record in said cause, including the proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, and the opinions of said Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of the court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send to this Court on day to be designated, a full and complete transcript of record and all proceedings of said United States Court of Appeals for the Eighth Circuit had in said cause, to the end that the said cause may be reviewed and determined by this Honorable Court as provided by law and that the said judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit be reversed by this Honorable Court and for such further relief as may seem proper. And your petitioner will ever pray.

JOS. T. DAVIS, and
DOUGLAS W. ROBERT,
Counsel for Petitioner.

State of Missouri, }
 City of St. Louis. } ss.

Jos. T. Davis, being duly sworn on oath deposes and says that he is counsel for petitioner, Edward F. Goltra; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied a duly certified copy of the transcript of record which accompanies the petition herein, being the transcript of record in the case at bar; that the matters in said petition are in the judgment of this affiant duly supported in and by said transcript of record, and that he knows of the proceedings had, and that the facts in said petition herein stated are true to the best of his knowledge and belief.

JOS. T. DAVIS.

Subscribed and sworn to before me this 7th day of August, 1925.

(Seal)

ETTA MANN,

Notary Public in and for the
 City of St. Louis, State of Mis-
 souri.

My term expires Jan. 10th, 1928.

I hereby certify that I have examined the foregoing petition, and in my opinion the petition is well founded, and that the case is one in which the prayer of the petitioner should be granted by this Court.

JOS. T. DAVIS,

Counsel for Petitioner.

No. 718

Office Supreme Court,
F I L E D

SEP 2 192

WM. E. STANB
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IN THE
Supreme Court of the United States.

EDWARD F. GOLTRA,

Petitioner.

vs.

JOHN W. WEEKS, Secretary of
War of the United States, COL.
T. Q. ASHBURN, Chief Inland &
Coastwise Waterways Service of
the United States, and JAMES
E. CARROLL, United States
District Attorney,

Respondents.

SUGGESTIONS IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI.

JOSEPH T. DAVIS,
DOUGLAS W. ROBERT,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States.

EDWARD F. GOLTRA,

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vs.

JOHN W. WEEKS, Secretary of
War of the United States, COL.
T. Q. ASHBURN, Chief Inland &
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E. CARROLL, United States
District Attorney,

Respondents.

SUGGESTIONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF GROUNDS FOR THE WRIT.

These suggestions are filed in support of the Petition for Writ of Certiorari requiring the United States Circuit Court of Appeals for the Eighth Circuit to certify to the Supreme Court, for its review and determination the case of John W. Weeks, Secretary of War, et al., appellants, v. Edward F. Goltra, respondent.

The opinions of the Court below have not yet been officially reported, but are printed in the printed record of this case herewith filed and the same will be found therein. (R., 105.)

The opinions were delivered, the judgment and order of said Circuit Court of Appeals were filed and entered July 23, 1925. (R., 126-141.)

The specific claims advanced, and rulings made in the lower court which are relied upon as the basis for the granting and issuing of this writ of certiorari are:

First: The majority opinion of said Circuit Court of Appeals has decided important questions of law in a way untenable and in conflict with applicable decisions of this Court and in conflict with the weight of authority, to-wit:

(a) That this suit for an injunction against the Secretary of War and his subordinates to restrain them, as individuals, from committing illegal and unauthorized acts of seizing the towboats, barges and other property and commanding the return of the property already taken, which has been and was legally in the possession and control of your petitioner, could not be maintained, and

(b) That such a suit was one, in effect, against the United States which could not be maintained.

(c) That the Secretary of War had the right, in his judgment and discretion, to, arbitrarily, terminate said contract of lease and option to purchase, without affording the lessee an opportunity to be heard.

(d) That the judgment of the Secretary of War is not subject to judicial inquiry, decision, or review.

(e) That by reason thereof the respondents, John W. Weeks, as Secretary of War; Col. T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney, were justified in seizing, without legal proceedings, without notice, by coercion, and force of men and arms,

said towboats and barges then in the possession and control of petitioner.

(f) That although the Government had, as here disclosed, entered into a commercial enterprise and was interested as a trader in a business venture for profit, still it retained its immunity from suit as a sovereign in a governmental capacity.

(g) By deciding and holding the contract of lease to be a contract with the Government and that the property was and is the property of the United States in its sovereign capacity, although the contract of lease was made with Edward F. Goltra by "Major General Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor," and designated in said lease as "party of the first part," and throughout refers to "him" as the lessor, and relates to and also recites the allotment of \$3,860,000 to said Chief of Engineers by the United States Shipping Board Emergency Fleet Corporation for the construction of said fleet.

(h) By interpreting clause 8 of said contract of lease and option as a forfeiture clause with power in the Secretary of War, in his judgment, to declare said contract terminated and to take, arbitrarily, and by force, said property.

Second: The majority opinion of said court has decided an important question of law in a way untenable and in conflict with the Fifth Amendment of the Constitution of the United States: "No person shall * * * be deprived of life, liberty, or property, without due process of law," to-wit: sustaining respondents' arbitrary seizure of your petitioner's property under circumstances as set forth in Judge Sanborn's dissenting opinion:

“Notwithstanding the provision in the lease and contract that William M. Black, the lessor, on non-compliance, in his judgment, by plaintiff with any of the terms of the lease and contract would be justified in terminating the lease and returning the property to the lessor,” is no grounds for “the conclusion that the acts of the defendants in this case, the notice of Honorable John W. Weeks, Secretary of War, of March 3rd, 1923, that, in his judgment, the plaintiff had not complied with the terms of the lease and contract, and his peremptory demand that the plaintiff surrender the property, his failure to give notice of or an opportunity for a hearing before him by the plaintiff on the question of the latter’s compliance with the terms of the contract, either before or after the plaintiff by his answer to the Secretary’s letter of March 3rd, 1923, requested such an opportunity and hearing by his letter of March 8, 1923, the sudden, coercing seizure and taking from the plaintiff of much of this property on Sunday, and the attempt to run it beyond the jurisdiction of the Court below, constituting due process of law.”

Third: The majority opinion of said court has decided important questions of federal law as set forth in the foregoing paragraphs which should be settled by this Court.

Your petitioner herein submits the following brief as an elaboration upon the foregoing and as presented in the accompanying petition.

AUTHORITIES.

I.

The United States Circuit Court of Appeals for the Eighth Circuit virtually invites and requests that this cause be certified to the Supreme Court for its determination:

Orders of said Circuit Court of Appeals. (R., 141-147.)

II.

The important questions of law herein referred to, and the conflict of opinions rendered herein by the said Circuit Court of Appeals, as well as the conflict with decisions of the Supreme Court and the weight of authority, warrant the granting and issuing of the writ:

The three separate opinions of said Circuit Court of Appeals in the instant case;

- (a) Opinion of the Court by Pollock, District Judge. (R., 105.)
- (b) Concurring opinion by Symes, District Judge. (R., 126.)
- (c) Dissenting opinion by Sanborn, Circuit Judge. (R., 131.)

Ex parte, in the matter of the United States, as owner of Nineteen Barges and Four Towboats, 263 U. S. 389, 393.

III.

This is not a suit against the Government of the United States, and the United States is not a necessary party thereto:

United States v. Lee, 106 U. S. 196;
Shipping Board Cases, 258 U. S. 549;
State of Colorado v. Toll, 15 S. Ct. Reporter, June
1st, 1925, page 581;
In re Ayers, 123 U. S. 443, l. c. 501;
Stanley v. Schwalby, 147 U. S. 508, l. c. 518, also
523, dissenting opinion of Field, J.;
Belknap v. Schild, 161 U. S. 10, l. c. 19;
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Philadelphia v. Stimson, 223 U. S. 605, l. c. 619;
Louisiana v. McAdoo, 234 U. S. 627, l. c. 629.

IV.

The contract of lease and option to purchase is not a contract with the Government of the United States in its sovereign capacity.

Shipping Board cases (supra).

V.

Where the Government of the United States has entered into a commercial enterprise and is interested as a trader in a business venture for profit, it cannot retain its immunity from suit as a sovereign in a governmental capacity:

Bank of United States v. Planter's Bank of Georgia,
9 Wheat. 904;

Bank of Kentucky v. Wister, 2 Pet. 318;
 Briscoe v. Bank of Kentucky, 11 Peters 257, 323;
 Louisville R. R. v. Letson, 2 How. 304, 308;
 South Carolina v. United States, 199 U. S. 43; Ship-
 ping Board cases (supra);
 Sec. 201 (e) of the Transportation Act of 1920.

VI.

Clause 8 of the contract of lease does not warrant the construction placed thereon by the Court below to the effect that it is a forfeiture provision granting to the Secretary of War, who is not designated therein, the power to terminate said contract, at his discretion or in his judgment, in an unwarranted and arbitrary manner, and thereby seize the property of the petitioner herein.

Shipping Board cases (supra);
 6 Ruling Case Law, 906, Sec. 291;
 3 Story's Equity Jurisprudence;
 Chapt. XXXVII, 14th Ed., 1918, Sec. 1728.

VII.

The decision of the Court below in sustaining the appellants below deprives your petitioner of his property without due process of law in violation of the 5th Amendment of the Constitution of the United States.

VIII.

The United States District Court for the Eastern District of Missouri, as a Court of Equity, had jurisdiction and authority to restrain these respondents, even though

they were officers of the United States, from wrongful and unwarrantable interference with property of the petitioner herein in an arbitrary, unwarranted and illegal manner, and such relief to your petitioner cannot be defeated upon the ground that the suit is one against the United States:

- Osborn v. The Bank of the United States, 9 Wheat. 738;
Noble v. United River Logging Railroad Co., 147 U. S. 165;
Philadelphia Co. v. Stimson, 223 U. S. 605, 613, 619;
Lane v. Watts, 234 U. S. 525;
Payne v. Central Pac. Ry. Co., 255 U. S. 228, 231;
American School of Magnetic Healing v. McAnulty, 187 U. S. 94, 1 c. 110.

STATEMENT OF FACTS.

A general statement of the facts is contained in the Petition herewith filed to which these suggestions are directed.

In addition thereto, however, attention is called to a misconception as to certain facts upon which the opinion of the Court below is based.

First: The opinion of the Court by Pollock, District Judge is in error as to this: "The fleet of towboats and barges were completed and turned over to plaintiff as lessee under the contract about July 15, 1921. The facts are that the boats and barges were delivered July 15, 1922, (R., 14, 70), the notice of termination dated March 3, 1923 and served on Sunday in Washington, D. C., March 4, 1923 (R., 19, 67), and the arbitrary seizure, with force and by coercion took place on Sunday, March 25, 1923 (R., 69); the Bill was hurriedly prepared, presented and filed Sunday, March 25, 1923 (R., 1), the tests, experiments and alterations were made subsequent to July 15, 1922 (R., 14, 71), the fleet made two trips (R., 71), and the navigable season closed about December 15, 1922, and reopened about the first of March, 1923 (R., 71).

The majority opinion fails to take into consideration the following facts:

That there was only a short intervening period from time of delivery and close of navigable season during

which to make tests, alterations and changes and to operate.

That the Mississippi River Warrior Service, a government operated barge line was operating on the Mississippi River at rates of eighty per cent of the rail tariff, which was under the control of respondents and for which the instant fleet was desired.

That the petitioner herein could not operate a rate equal to the rail tariff.

That under clause 2 (a) petitioner could only operate as a common carrier "at rates not in excess of the prevailing rail tariffs and not less than the prevailing rail tariffs" * * * "without the consent of the Secretary of War"; * * * "But nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made provided the Secretary of War consents to such use other than as a common carrier." (R., 5.)

That the Secretary of War assumed control and maintained the right to fix the rates and the commodities to be transported.

That on March 10, 1921 the Secretary of War authorized the petitioner to operate the fleet, when delivered at rates eighty per cent of the rail tariff. (R., 61.)

That petitioner began soliciting shipments and made commitments under said authority. (R., 16.)

That on March 31, 1922, the Secretary of War denied having granted said rate (R., 62), to-wit:

"I am told there was recently an interview in the St. Louis Post-Dispatch in which you stated I had authorized you to make rates on the lower Mississippi

at eighty per cent of the railroad rates. I have not seen the interview so I am not clear that what I have stated is definitely correct. But, in any case, I told you at the time I could not authorize or approve any operation on the lower Mississippi that would enter into competition with the established line of barges. This line is operated for a definite purpose and should not be interfered with in that operation by any action of the Government.

"I said if there was freight on the lower Mississippi which could not be handled by the present operating line and it could be transported by your barges, in that case I would authorize a rate of eighty per cent of the railroad rate. In making this statement I was assuming that what you told me—that the present line could not handle the material which you mentioned—is a fact; but any rate charged must be agreed to by General Downey and the operators of the present line.

"Your contract calls for a rate not less than the railroad rate without the approval of the Secretary of War and I shall give no approval which does not carry out this general statement."

That on May 6, 1922 the Secretary of War withdrew and canceled said rate (R., 64), to-wit:

"You are hereby notified that under the provisions of paragraph 2 (a) of the certain contract No. E7076 between yourself and Major General William M. Black, Chief of Engineers, United States Army, dated May 28, 1919, as supplemented by an amendment thereto dated May 26, 1921, the consent and approval of the Secretary of War heretofore, on the 4th day of March, 1921, given to the operation by you of the vessels covered by and included under the provisions of said contract, at transportation rates equal to 80%

of the prevailing rail tariffs, is hereby withdrawn and canceled as to any and all contracts, agreements or undertakings for transportation on the Mississippi River and its tributaries below the City of Saint Louis, Missouri, hereinafter made and entered into by you.

"From and after this date you are authorized to operate said vessels on the Mississippi River and its tributaries below the said City of St. Louis, only at transportation rates equal to and not less than the prevailing rail tariffs, save and except in such cases, and as to such transactions and commodities as the Secretary of War shall, upon application to him, have previously specifically consented to and approved."

That on May 25, 1922, the Secretary of War gave authority to transport a limited list of commodities (R., 65), to-wit:

"In compliance with the terms of my letter of May 6, 1922, you are hereby authorized to transport the following articles from port to port on the Mississippi River or its tributaries at not less than 80% of the all rail rates:

"Liquids in bulk, including liquid asphalt or road oil, in drums; coal, lumber, sulphur, ties, cement, salt, sand, gravel, crushed rock, and grain over and above the capacity of the Mississippi-Warrior Service to handle such commodity."

"Due to the conditions limiting the amount of grain which may be handled thru New Orleans, and due to the limited elevator capacity at Cairo and St. Louis, you will be required to obtain from Mr. Theodore Brent, Federal Manager, Mississippi-Warrior River Service, or his representative in St. Louis, Mr. J. P. Higgins, the amount of grain you may carry and specific dates upon which you can carry it.

“The officials of the Inland and Coastwise Waterways Service, and the Mississippi Section, have been instructed to co-operate with you to the fullest extent in making the operation of your fleet a success; the only limitation being that you shall not engage in such competition with them as to stifle the success of the Mississippi River Service. You will realize the necessity of the restrictions put upon you in the movement of grain, but the other commodities offered you for transportation exceed all the claims you have heretofore advanced concerning contracts entered into by you for the transportation of any commodities.”

That petitioner could not operate said expensive fleet under such limited authority.

Said majority opinion fails to recognize the following facts:

That the Chief of Engineers is designated as the lessor in the contract. (R., 4.)

That under clause 8 the Chief of Engineers, as lessor, is designated to act, and the Secretary of War is given no power or authority thereunder. (R., 9.)

That prior to the seizure, respondent, Col. T. Q. Ashburn, was directed (R., 68) as follows:

“In the event of his failure or refusal to make delivery of the property demanded, you will apply to the United States District Attorney at St. Louis, requesting the institution of legal proceedings for the recovery of said property.”

AUTHORITIES RELIED UPON BY COURT BELOW.

The majority opinion below cites *Wells v. Roper*, 246 U. S. 335. A careful reading of this case will disclose an entirely different state of facts and that it is not applicable to the case at bar.

In that case, based upon a contract with the Postmaster General acting for the United States, in its governmental capacity, the contract provided specifically that the Postmaster General or the First Assistant could terminate the contract under this stipulation: "any and all equipment contracted for herein may be discontinued at any time upon ninety days' notice from the said party of the first part," and the "Postmaster General notified plaintiff in writing that it was essential for the purpose mentioned that his contracts should be canceled, etc."

Furthermore, it will be noticed in that case, that in so doing the Postmaster General was acting in an official capacity under a specific appropriation of Congress for the very purpose contemplated in said contract wherein he was given discretionary power under the appropriation.

"Then the Postmaster General, acting under a provision of an appropriation act approved March 9, 1914, Chap. 33 etc., by which he was authorized in his discretion to use such portions, etc."

As to other cases relied upon we presume to make the statement of United States District Judge Faris, in his first opinion in the instant case, our comment therein:

"Numerous cases, some of which are relied on by counsel for defendants as on all fours with the case at bar, are called to my attention. Generally, these

cases are of the type of *Wells v. Roper*, 246 U. S. 355; *Oregon v. Hitchcock*, 202 U. S. 60; *Naganab v. Hitchcock*, 202 U. S. 473; *Stanley v. Schwalby*, 162 U. S. 255; *Louisiana v. Garfield*, 211 U. S. 70; *Louisiana v. McAdoo*, 234 U. S. 627; all of which cases dealing with rights, property and attributes of the United States accruing to it in its strict capacity as a sovereign. These cases dealt with lands, or titles thereto, held by the United States under allodial tenure as a sovereign, with vessels (vide, *The Siren*, 7 Wall. 152), captured by it in war, with import duties levied pursuant to constitutional grant of power, with matters pertaining to post-offices and postroads, and others of a similar sort had, done and transacted by the United States pursuant to constitutional grant of power in its strict governmental capacity as a sovereign."

ADDENDA.

For the information of this Court and as part of these suggestions, we print in the Addenda (1) the "Oral Opinions of the Court (United States District) on motion to dismiss the bill," and on the hearing for a temporary injunction; (2) the dissenting opinion of Sanborn, Circuit Judge, rendered in the court below.

In conclusion, we respectfully submit that the writ of certiorari herein prayed for should be granted and call the Court's attention to the comment of this Court when this case was before this Court upon an application for a writ of prohibition:

"The merits of the case present interesting questions. The question of remedy is, however, the more insistent. Does the case justify it? Prohibition is a remedy of exigency and in exclusion of other process

of relief. It is directed against unwarranted assumptions of jurisdiction or excesses of it. In some cases there may be instant judgment that such is the situation and the writ granted. In other cases there may be doubt and the writ denied. *Ex parte Moir*, 254, U. S. 522, 524. And doubt in the instant case would seem to be justified, for two district Courts (referring to the Court below and the district Court for the Northern District of West Virginia in *United States Harness Co. v. Graham*, 288 Fed. 929), have decided that, under circumstances such as presented in this case, it does not involve or constitute a suit against the United States. And also the writ is to be denied if there be remedy against the action complained of by appeal."

Ex parte, in the matter of the United States as owner of Nineteen Barges and Four Towboats, 263 U. S. 389, 393.

We desire to call attention to the fact that the order of the Circuit Court of Appeals set forth on page 2 of the petition herein has been modified, so that the time to petition this Court for a writ of certiorari has been extended to ninety days from July 23rd, 1925 (R., 147), and that the petitioner has complied with the order in regard to the bond (R., 148).

And we add, in order that there may be no misunderstanding, although it may not be material in the consideration of this case, that the boats and barges have been in active use, and that Mr. Goltra has been operating them upon the Mississippi River ever since the temporary injunction was granted, having been able to do so by getting the consent of the Secretary of War to reduce the rates to a figure somewhat below eighty per cent of the railroad rates (R., 143-4).

Respectfully submitted,

JOSEPH T. DAVIS,
DOUGLAS W. ROBERT,
Attorneys for Petitioner.

ADDENDA.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT.

<hr style="width: 20%; margin: 0 auto;"/> <p>JOHN W. WEEKS, Secretary of War of the United States, et al.,</p>	}	No. 6871
v.		
EDWARD F. GOLTRA,	}	
	Appellee.	

DISSENTING OPINION OF SANBORN, J.

Sanborn, Circuit Judge, dissenting.

When the controversy that resulted in this suit in equity arose, the plaintiff was in lawful possession of the four towboats and nineteen barges. The lease and contract of sale of May 28, 1919, and the delivery of possession of the vessels to him on July 15, 1922, had vested in him the lawful possession of the property and the absolute optional right by a compliance with the terms of the contract to the continuous possession and to the legal title to this

property at any time prior to July 15, 1927, the time of the expiration of the term of the lease and contract of sale. He was in the position of an optional vendee of real or personal property to whom the vendor, bound by his contract to convey on payment by the vendee in the future of the unpaid part of the purchase price, has delivered the possession of the property. In equity he was the optional owner in lawful possession of the property and the vendor held the legal title to it as trustee for him, the cestui que trust.

The contract of lease and sale recited that the barges and towboats were to be constructed by the United States for and adapted to the transportation of iron ore and coal, but when they were delivered to the lessee and optional vendee, about July 15, 1922, they were so defective that he was compelled to expend and did expend \$40,000 of his own money to make them operative. That contract provided that he should operate these vessels as a common carrier on the Mississippi River and its tributaries "at rates not in excess of prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War," and that the lessor reserved the right to inspect the plant, fleet and work to see that the terms and conditions of the lease were fulfilled and that "non-compliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor."

On March 3, 1923, the defendant Honorable John W. Weeks, Secretary of War, without notice to or hearing of the plaintiff on the question of his compliance with the terms of the contract, in writing notified him that, in his judgment, he had not complied with them, in that he had failed "to operate the said towboats and barges as a common carrier and in other particulars," but none of these other particulars was described, and he declared the con-

tract terminated and directed the plaintiff to deliver possession of the vessels to the defendant, Colonel T. Q. Ashburn, who was authorized by him to receive and receipt for them. There was a "Memorandum for Colonel Ashburn" attached to this written notice whereby the latter was directed to deliver to the plaintiff in person the notice and to demand the possession of the property, the last paragraph of which read in this way:

"In the event of his failure or refusal to make delivery of the property demanded, you will apply to the United States District Attorney at St. Louis, requesting the institution of legal proceedings for the recovery of said property."

If this direction had been put into effect and such legal proceedings had been instituted, it seems probable that the rights of the plaintiff, the defendants and the United States would have been finally determined before this date and continuing litigation would have been avoided.

On March 8, 1923, the plaintiff in writing answered the demand for possession of the property. The pertinent portion of that answer was in these words:

"* * * Most respectfully, I decline to comply with your demand. To do so would deprive me, without any notice whatever, or opportunity to be heard, of rights and property lawfully acquired at a very large expenditure by me of time and money. I have, in face of most unjust interference and restrictions, fully complied with all of the terms of my contract, and, further, I have complied with every demand or requirement made of me by either you or the Chief of Engineers of the United States, the lessor named in my contract.

"The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has

in fact no substantial basis on which to rest. This I believe will be fully demonstrated to you if I am granted a fair and impartial hearing to which, as a citizen, I am entitled, and which, in fairness and justice, I now request.

Very respectfully yours,

EDWARD F. GOLTRA."

The record discloses no reply to this answer and courteous request for a hearing, but without either on Sunday, March 25, 1923, the defendants, without the consent and against the protest of the plaintiff's agents in possession of the vessels, with a coercing force of men, took possession of the boats and barges at St. Louis, Missouri, and ran them down the river and held them upon the Illinois side thereof in the belief that the District Court below had no jurisdiction over that portion of the Mississippi River between Missouri and Illinois adjacent to the Illinois bank. As soon as this sudden Sunday seizure came to the knowledge of counsel for the plaintiff they prepared and presented to the Court below his bill in equity against the defendants, wherein he prayed for a restraining order and an interlocutory injunction against them for the purpose of holding the property in the possession of the plaintiff in the state in which it was before the sudden Sunday seizure, until the claims of the respective parties thereto could be fairly heard, considered and decided.

The only specific charge in the demand for possession of these vessels was that the plaintiff had not operated the vessels as a common carrier. In his bill in equity the plaintiff alleged that by the provisions of the lease and contract the defendant, the Secretary of War, had the control of the rates which the plaintiff might charge for transportation of commodities by the use of these vessels,

that he obtained contracts for the transportation of immense quantities of commodities at reasonable rates, but that the defendant, the Secretary of War, by the use of the power over his rates vested in him by the lease and contract prohibited him from operating or refused him the necessary permission to carry commodities at operative rates either as a common carrier or as a private carrier, and thereby arbitrarily deprived him of the opportunity to carry out his contracts with shippers and made it absolutely impossible for him to operate the vessels either as a common carrier or otherwise.

The plaintiff prayed for an immediate restraining order an interlocutory injunction against the sudden seizure, removal and possession of this property by the defendants and for an ultimate determination by the Court below of his right to the possession and his equitable interest in this property. On this bill and the facts which have been recited his counsel immediately invoked the exercise by the Court below of its judicial discretion to preserve the status and possession of this property by its restraining order and its interlocutory injunction as they existed prior to the defendants' seizure until there could be a hearing, consideration and decision by the Court of some of the rights and equities of these parties. The plaintiff was met not by answers by the defendants to the merits of the bill, but by a claim in their returns to the order to show cause why the injunction should not issue that the Court had no jurisdiction of the suit because the United States was a necessary party to it and by a claim that the Mississippi-Warrior Service, a barge line in which the United States was operating on the Mississippi River and to prevent the plaintiff's competition with which he alleges in his bill he was informed that the Secretary of War had prevented his use of operative rates, had offered to use his barges and towboats and to pay him fair compensation for such use. But his acceptance of such an

offer would not have constituted a performance of his contract to operate these boats and barges as a common carrier or otherwise. He was also met by the suggestion of the Attorney General of the United States, that the Nation was a necessary party to this suit, and, by his motion, appearing only for the purpose thereof, to dismiss this suit on that ground. The district judge below patiently heard the claims and arguments of the parties to this suit, deliberately and exhaustively considered them, denied the motion to dismiss the suit and granted the restraining order and the interlocutory injunction and wrote careful opinions in which he clearly set forth his reasons for his action.

The case is in this court on an appeal from his order granting the interlocutory injunction. The decisive question presented to him upon the application for that injunction was, whether or not in the exercise of his judicial discretion he ought or ought not by his injunction to hold these vessels temporarily until there could be a fair hearing and just decision of some of the important issues in this case in the position and situation in which they were when defendants seized them. By the established principles and rules of equity jurisprudence the authority was granted to and the duty, which he could not lawfully renounce or evade, was imposed upon him, and was not granted or imposed upon this court or its members, to decide this question according to his judicial discretion. *Denver & Rio Grande R. R. Co. v. United States*, 124 Fed. 156, 160. And the question for this court in this case is not whether or not it or its members would have exercised his judicial discretion in the way the judge below exercised it, but is only whether or not he improvidently, illegally or abusively exercised that discretion. *Stearns-Rogers Mfg. Co. v. Brown*, 114 Fed. 939, 941, 942, and cases there cited; *Denver & R. G. R. R. Co. v. United States*, 124 Fed. 156, 160.

An indisputable rule for the guidance of the Court below in the exercise of his sound judicial discretion in this case was and is that an interlocutory injunction maintaining the existing condition of the property may properly issue whenever the questions of law or fact to be ultimately determined in the suit are grave and difficult and injury to the moving party will be immediate, certain and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and may well be indemnified by a proper bond if the injunction is granted. *Georgia v. Brailsford*, 2 Dallas 402, 406, 407; *Magruder v. Belle Fourche Valley Water Users Assn.*, 219 Fed. 72, 82; *Denver & Rio Grande R. R. Co. v. United States*, 124 Fed. 156, 161; *City of Newton v. Levis*, 79 Fed. 715, 718; *Allison v. Corson*, 88 Fed. 581, 584; *Stearns-Roger Mfg. Co. v. Brown*, 114 Fed. 939, 944; *Harriman v. Northern Securities Co.*, 132 Fed. 464, 476, 477, 480, 485; *Carpenter v. Knollwood Cemetery*, 188 Fed. 856, 857; *Wilmington City Ry. Co. v. Taylor*, 198 Fed. 159, 198; *Chew v. First Presbyterian Church*, 237 Fed. 219, 222; *American Smelting & R. Co. v. Bunker Hill & S. Min. & C. Co.*, 248 Fed. 172, 182. The district judge without doubt followed this rule. He took an ample indemnifying bond as a condition of the issue of the injunction and the question of jurisdiction alone seems to have been sufficiently grave and difficult in view of the circumstances surrounding the seizure by the defendants to warrant his action. In *Ex parte In the Matter of the United States, as Owner of Nineteen Barges and Four Towboats*, 263 U. S. 389, 393, the Supreme Court denied an application of the United States for a writ of prohibition to forbid the district judge below from enforcing his injunction against the defendants in the case in hand on the ground that the United States was a necessary party to this suit, and said:

“The merits of the case present interesting questions. The question of remedy is, however, the more insistent. 100, 101; *Stearns-Roger Mfg. Co. v. Brown*, 114 Fed. 939,

Does the case justify it? Prohibition is a remedy of exigency and in exclusion of other process of relief. It is directed against unwarranted assumptions of jurisdiction or excesses of it. In some cases there may be instant judgment that such is the situation and the writ granted. In other cases there may be doubt and the writ denied. *Ex parte Muir*, 254 U. S. 522, 524. And doubt in the instant case would seem to be justified, for two district courts" (referring to the court below and the district court for the Northern District of West Virginia in *United States Harness Co. v. Graham*, 288 Fed. 929) "have decided that, under circumstances such as presented in this case, it does not involve or constitute a suit against the United States. And also the writ is to be denied if there be remedy against the action complained of by appeal."

Moreover, the United States acts and can act, contract and estop itself only by the acts, contracts and estoppels that are authorized or wrought by its officers or agents. In the opinion of the writer by their action in this case the United States made William M. Black the lessor and vendor of the property, vested the legal title to it in him, and the possession and equitable title in it in the plaintiff, represented and held him out as competent to make the terms of the lease and contract obligatory upon him and upon the property and enforceable by the courts in suits against him and his assigns without making the United States a party to such litigation. It does not appear and it is improbable that the plaintiff would ever have made this lease and contract with United States, reserving to itself the right to exempt itself and the property from the jurisdiction and power of the courts to enforce the terms of the contract obligatory upon it, and it seems to the writer that the United States and the lessor Black and his successors in interest are estopped by this lease and contract and their acts in placing and holding out the property as subject to its enforceable terms from preventing the plaintiff from protecting his rights and interests therein by suits against Black, the lessor, and his assigns

on the ground that the United States is a necessary party thereto. If, on the other hand, the United States or the defendants, by the plea that the former is a necessary party to all suits to enforce or protect the rights of the plaintiff in this property, its possession, the lease and contract concerning it, and by the refusal of the United States to become a party to any such suits or to bring suit itself, may defeat all such suits without regard to their merits, the plaintiff is left practically remediless and his lease and contract become practically a deceitful sham. Again, the lease and contract of sale and the rights of all parties in interest thereunder arose from and evidence business or commercial transactions. In none of them was or is the United States acting as a sovereign in governing the Nation or the people of the Nation. The entire transaction and any interest it may have in it and the property involved as against the plaintiff is a commercial and business and not a governmental matter. As against him it stands in the relation of a private party divested of its privileges and immunities as a sovereign, and, hence, of its privilege of exemption from suit against the party it made the lessor in this contract and amenable to the suits to enforce it. *United States v. Planter's Bank of Georgia*, 9 Wheaton 904.

Moreover, the jurisdiction of the court is not the only question in this case. On the day this suit was commenced and for more than a year before that day, the vessels were in the possession of the plaintiff under the lease and contract of sale, which contained the provision that non-compliance by the lessee in the judgment of the lessor, William M. Black, Chief of Engineers, directed by the Secretary of War to represent the United States, with any of the terms or conditions of the lease would justify his terminating and returning the property to the lessor. It will be noticed that the only condition that would justify the termination of the lease and the return of the property to the lessor was the noncompliance by the lessee in the

judgment of the lessor Black with the terms of the lease, while the defendants' claim to possession rests on non-compliance in the judgment of Honorable John W. Weeks, Secretary of War. The large value of the property subject to this lease and contract, the serious effect of the decision to be rendered by the judgment of Mr. Black, leave no doubt in the mind of the writer that the plaintiff entrusted this decision to and relied upon the individual wisdom, experience, knowledge, just and deliberate fairness of Mr. Black. The record does not disclose any decision of this question of noncompliance by him or any consent or agreement by the plaintiff to substitute the judgment of Honorable John W. Weeks, Secretary of War, or of any other person or officer for that of Mr. Black, and it seems to the writer that the judgment of Mr. Weeks, the Secretary of War, was not binding upon the plaintiff, was unauthorized and ineffective. When two opposite parties agree to submit a controversy between them to the judgment of a chosen arbiter in whose fairness, wisdom, deliberation and discrimination they have confidence and to abide by his decision, the consent and agreement of both is indispensable to the substitution of another individual as arbiter in his place.

Again, the possession of this property, the optional right to purchase it on the terms prescribed by the contract, each of them constituted valuable property of the plaintiff vested in him under the contract. If the authority to take this property from the plaintiff when in his judgment the latter failed to comply with any of the terms of the lease and contract had been given to Honorable John W. Weeks, Secretary of War, as in the opinion of the writer it was not, the exercise of that authority and the taking of the possession and the property would have been conditioned by the fair, deliberate and judicial exercise of his judgment after reasonable opportunity for the plaintiff to present the pertinent facts and to be heard concerning his compliance with the terms of the contract.

An arbitrary declaration or decision of the Secretary that in his judgment the plaintiff had failed to comply with the terms, without prior notice to him of the Secretary's proposed consideration of that question, without opportunity for him to present to the Secretary his claim that he had complied and the facts and reasons upon which he based that claim and without thoughtful, fair and deliberate consideration of those facts and reasons before forming his judgment, it seems to the writer would not have warranted a judgment by the Secretary that the plaintiff had not complied with the terms of his contract. The plaintiff alleges in his complaint that no such notice or opportunity for him to present the facts and reasons why he had complied was given to him before the Secretary formed his alleged judgment, nor before his seizure of the property, although by the plaintiff's letter to the Secretary of March 8, 1923, he courteously requested such a hearing by the Secretary.

The 5th Amendment of the Constitution of the United States states: "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *". This provision of the Constitution forbids citizens, officers, courts, and the United States itself, from depriving any person of his property without due process. Notwithstanding the provision in the lease and contract that William M. Black, the lessor, on noncompliance, in his judgment, by the plaintiff with any of the terms of the lease and contract would be justified in terminating the lease and returning the property to the lessor, the writer is unable to bring his mind to the conclusion that the acts of the defendants in this case, the notice of Honorable John W. Weeks, Secretary of War, of March 3, 1923, that, in his judgment, the plaintiff had not complied with the terms of the lease and contract and his peremptory demand that the plaintiff surrender the property, his failure to give notice of or an opportunity for a hearing before him by the plaintiff on the question of the latter's compli-

ance with the terms of the contract, either before or after the plaintiff by his answer to the Secretary's letter of March 3, 1923, requested such an opportunity and hearing by his letter of March 8, 1923, the sudden, coercing seizure and taking from the plaintiff of much of this property on Sunday and the attempt to run it beyond the jurisdiction of the court below, constituted due process of law. To the writer they look more like an attempt to avoid or evade due process of law.

The questions of law and equity to which reference has now been made in the mind of the writer are grave and difficult and, in view of them, the judge below was required to and did exercise his judicial discretion in issuing the interlocutory injunction. On this appeal from the order for its issuance the only question judicable by this court is, whether or not the order for the injunction and the record in this case evidence an unlawful, improvident or abusive exercise of his sound judicial discretion. As has been said earlier in this opinion, the law imposed upon him the duty to exercise this discretion and the responsibility for its exercise and left him wide latitude for action within the rules prescribed for his guidance. Neither that discretion nor the exercise of it was entrusted to this appellate court or to either of its members and, in the opinion of the writer, it ought not to interfere with that exercise by the judge below to whom it was entrusted, unless an improvident, careless or unreasonable exercise of it, violative of the rules of law which should have guided his action, has been committed. *Blount v. Societe Anonyme Du Filtre, etc.*, before Circuit Judges, afterwards Justices of the Supreme Court, Taft and Jackson, 53 Fed. 98, 99, 941, 942. For the reasons stated above, the writer is not convinced that anything of this nature characterized the action of the court below in the granting of this injunction and he is unable to resist the conclusion that the order for it ought to be affirmed.

DISTRICT COURT OF THE UNITED STATES IN AND
FOR THE EASTERN DIVISION OF THE EASTERN
JUDICIAL DISTRICT OF MISSOURI.

EDWARD F. GOLTRA,

Plaintiff,

vs.

WEEKS, ET AL.,

Defendants.

} In Equity
No. 6639

**ORAL OPINION OF THE COURT ON MOTION TO
DISMISS BILL.**

FARIS, J.

Plaintiff entered into charter-party, executed by the Chief of Engineers of the United States Army for the leasing or chartering of nineteen barges and four towboats, for a period of five years, with the option in lessee to purchase these vessels at the termination of the charter-party.

Upon completion of the construction of these vessels they were delivered to the plaintiff, and since have been (until the time hereinafter mentioned) in his possession, and until that possession was interfered with by the de-

fendants in the manner hereinafter more specifically set out.

The parties to this lease or charter-party are recited in the instrument thus:

"This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as the lessee * * * party of the second part."

Plaintiff has sued here for an injunction, both to prevent further interference with his possession of these vessels, and to compel the restoration of them to his possession, charging in this behalf that, being on Sunday, March 25, 1923, in the peaceable and lawful possession of these vessels, that on said date defendant, Ashburn, acting under alleged orders of the defendant, Weeks, forcibly, and without warrant of law, and without due process, or any process of law whatever, came upon said vessels and drove off the servants and employees of plaintiff then in charge thereof, and took and towed these vessels down the Mississippi River, in an effort to get them beyond the jurisdiction of this Court; that such act of the defendant, Ashburn, and the defendant, Weeks, if, in fact, he ordered it to be done, is in contravention of the rights of plaintiff, for that plaintiff's property may not be taken from him without due process of law, and without any process of law whatever, and in contravention of the charter-party under which plaintiff got and held these vessels, and in contravention of the constitutional rights of this plaintiff.

Defendants, Ashburn, and Carroll, as District Attorney

of the United States the latter of whom is a mere formal party), were duly served with process. Defendant, Weeks, has voluntarily entered his appearance, and all of these defendants have moved to dismiss the bill of complaint, for that the United States, as the alleged owner of the vessels in dispute, and as the actual lessor thereof, is a necessary party defendant, without whose presence this action cannot proceed, and since the United States cannot be sued without its consent, this action must fail.

It was suggested on oral argument, that since the contract of charter reserves to the lessor the right to terminate the lease at any time for noncompliance with any of the terms or conditions thereof, whenever in the judgment of the lessor such noncompliance exists, such taking of the vessels was lawful, and no action whatever will lie against either defendants, or against the United States or against anyone else. This oral contention is not referred to in the motion before me, and scant consideration is devoted to it in the briefs. In any event, I think it may be dismissed with the suggestion that the judgment to be exercised by the lessor could not be exercised arbitrarily, or whimsically, or baselessly, and utterly without the existence of any breach on plaintiff's part, as the bill here alleges.

Upon the motion it is contended by defendants, that not only does the language of the charter-party make plain that the United States is the lessor, but that inherently the relief which this Court must afford, if it give any, requires that the United States be a party, since valuable alleged vested rights of the latter must of necessity be determined as a condition precedent to the giving of any relief; that the charter-party itself, eliminating merely parenthetical recitations of the names of those representing it and designated to act for it, clearly names the United States as the lessor. If the clause designating the

parties stood alone, the correctness of this contention would have to be conceded. Such doubt as is thrown upon its correctness, arises from the uniform use of the personal pronoun "he" in designating the lessor, and from the statutory and fact history of these vessels.

If the United States is the lessor, then plaintiff could not be heard to dispute its title, and the case must be dealt with upon the question whether this Court can afford any relief unless the actual lessor is before the Court as a party. Clearly, no permanent order of injunction can be entered here until it is determined whether the law and the facts adduced furnish a warrant for the judgment exercised by the Secretary of War in attempting to declare the charter-party at an end, or whether, if the facts do not warrant such action, a proper legal construction of the terms of the charter-party warrant such cancellation by the Secretary of War, absent any sufficient defaults on plaintiff's part in carrying it out.

I think it follows, that the lessor must be before the Court before the Court can dispose of the case, or the law must be held to be that the presence of the lessor in court is not necessary, even when valuable rights of the lessor are being determined, when such determination becomes necessary in order to protect the citizen in his constitutional rights against the flagrant violations of those rights by the officers who assume to act for the real lessor.

Reference to the origin and history of the money with which the vessels in dispute were built; to the statutes under which they were built, and to the statutes which provided for their control and ultimate disposition, may serve to throw some light upon the identity of the lessor.

The charter-party says, and the bill alleges (and by the bill, under the law, I am bound, for the uses and

purposes of this motion to dismiss, and this is so, whether the allegations of the bill be true as a matter of fact or not), that all the money used to construct these vessels was furnished by the United States Shipping Board Emergency Fleet Corporation to the Chief of Engineers of the United States Army.

The Fleet Corporation was organized as a quasi private corporation (though, essentially, it was a public corporation) under the laws of the District of Columbia, on the sixteenth day of April, 1917. All of the fifty million dollars of capital stock of the Fleet Corporation was subscribed, taken and owned by the United States (*Sloan Shipyards v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 566).

By the act of Congress of June 5, 1920 (41 Stat. 988) the Fleet Corporation was continued in existence, but the title to practically all of the boats, barges, ships and vessels formerly owned and held by the Fleet Corporation was transferred to the United States Shipping Board, which is a mere arm, or administrative bureau of the United States.

However, I am not able to construe the great mass of confusing statutes (confusing, I trust, because of lack of time of this Court, when faced by multitudinous duties, to properly read and understand them), which dealt with the many transportation facilities, by land and water, in an effort to unscramble them following the Great War, as including the vessels here in dispute among those which were transferred to the Shipping Board. On the contrary, I think it is clear that the title to them was left in the Fleet Corporation (so far as title vested in such Fleet Corporation by reason of its furnishing the money with which they were constructed), and, that, likewise the custody and control over them was left where the old statutes

and existing contracts about them had placed such custody and control.

For the Act of June 5, 1920, excepted these vessels from the transfer to the Shipping Board by a proviso to Section 4 of said Act, which proviso reads:

“Provided: That all vessels * * * assigned to river and harbor work, inland waterways, or vessels for such needs in the course of construction, or under contract by the War Department, shall be exempt from the provisions of this Act.”

Since the vessels in dispute were not only “vessels assigned to inland waterways,” but they were still in course of construction, as also under contract, when the Act of June 5, 1920, was passed, by the War Department, to plaintiff here; for, on the second of the above propositions the bill before me says:

“These vessels were not completed until long after said date (that is to say, May 28, 1919, the date of the contract) and were not delivered to plaintiff until July 15, 1922.”

Whether this allegation is true or not, does not, of course, concern me now, because I am bound (as heretofore said) by what the petition alleges, so far as the motion to dismiss, at least, is concerned.

I am of opinion, then, that the title and ownership of these vessels (again, so far as such title and ownership could be predicated on the source of the money used to build them) was left by the Act of June 5, 1920, in the Fleet Corporation, and that the custody and control over them was in the War Department; that this custody and

control in the War Department arose solely by reason of the fact that the \$3,860,000.00 with which they were constructed, had been paid by the Fleet Corporation to the Chief of Engineers of the United States Army, and, since the Chief of Engineers of the United States Army was subordinate to, and acted under orders of the War Department. So far as I have been able to see, this chain of circumstances, and this alone, puts the custody and control of these vessels in the Secretary of War.

Some corroboration of this view is lent by some of the provisions of the so-called Transportation Act, of February 28, 1920 (Section 201, Act of February 28, 1920). By the provisions of the latter Act, all boats and vessels on inland waterways, which had come into the control of the United States by virtue of the provisions of Paragraph 4, Section 6 of the Federal Control Act, or which had been built with any money out of the five hundred million dollars revolving fund provided by Section 6, *supra*, were transferred to the custody and control of the Secretary of War. But these vessels were not obtained pursuant to the provisions of Paragraph 4, Section 6 of the Federal Control Act, nor were they built out of any part of the revolving fund provided in said section 6 of the Federal Control Act.

This view is corroborated by a further provision of Section 201 of the Transportation Act, which does specifically deal with and refer to the vessels in dispute. This is clause (d) of said Section 201, which reads thus:

“Any transportation facilities owned by the United States and included within any contract made by the United States, for operation on the Mississippi River above St. Louis, the possession of which reverts to the United States at or before the expiration of such

contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above St. Louis."

A further provision of said Section 201 of the Transportation Act, contained in clause (c) thereof provided, that all merchant vessels owned by the United States, in whole or in part, when operated by the Secretary of War, or by the Shipping Board, should be subject to all laws, regulations and liabilities, affecting, or applicable to, privately owned merchant vessels. But I put no stress upon this, for it so clearly limits the laws, regulations and liabilities to admiralty and maritime regulations and liabilities, as that it can furnish no light here.

Moreover, this view is strengthened, and the application of even admiralty laws is modified, by the provisions of the Act of March 9, 1920 (41 Stat. 525) whereby, *inter alia*, it is provided, that no vessel of the United States, or of any corporation in which all the capital stock is owned by the United States, shall be proceeded against by any seizure in admiralty or *in rem*.

The above Act of March 9, 1920, recognized and dealt with the fact that when it was passed there were still in existence boats and vessels, the title and ownership whereof was in a corporation wherein all the capital stock was owned by the United States. This affords an additional reason for the view I have already expressed, that the Transportation Act did not transfer either the title, custody or control, of these vessels to the Secretary of War, but left such title, custody and control (particularly title) where they had always been. There can be, I think, no doubt that the Act of June 5, 1920, already discussed, did not transfer the vessels to the Shipping Board.

Since, from the view above expressed to the specific

application of clause (d) of Section 201, *supra*, of the Transportation Act, to the vessels here in controversy, it may be argued, that this language completely forecloses any contention that the United States is not the owner of these vessels, I may observe in passing, that there can be no doubt, that the United States is the beneficial owner of them. It owns them because it owned and now owns, all of the capital stock of the Fleet Corporation, which furnished the money to build them, and because the United States appropriated all the money to the Fleet Corporation, which the latter ever used or ever had. But, in a sense, the United States was a *cestui que trust* of these vessels, holding, as said, the complete beneficial title thereto, while the Fleet Corporation, a *quasi* private corporation, was the trustee holding the legal title.

In such situation, both Congress and the United States dealt with these vessels as if the United States not only was the absolute owner of them (as it was, in effect), but had the legal title to them, also absolutely.

If the statutes above considered have been correctly interpreted by me; if I have not overlooked, in the confusing mass of statutes passed in an effort to return to pre-war normalcy, and in the face of lack of time for careful inquiry incident to the hundreds of other pressing matters and duties confronting me, some applicatory statute, I think a few enlightening principles have been established. These are:

(a) That the vessels here in controversy were built with money furnished by the United States Shipping Board Emergency Fleet Corporation.

(b) That the said Fleet Corporation was a *quasi* private corporation, in which all of the capital stock was owned by the United States;

(c) That all of the money with which the Fleet Corporation operated, came either out of the proceeds of the sale of certain Panama Canal bonds (Act of September 11, 1916, 39 Stat. 728), or was appropriated to the Fleet Corporation by Congress from the revenues of the United States, by the Act of March 1, 1918 (40 Stat. 438) or, by the Act of July 1, 1918 (40 Stat. 634);

(d) That this money which so built these vessels, was turned over by the Fleet Corporation, for this purpose, to the Chief of Engineers of the United States Army, who is an officer of the United States, acting under and by orders from the Secretary of War;

(e) That these vessels being thus created and held, were chartered to plaintiff by the Chief of Engineers of the United States Army, who acted in such behalf by direction of the Secretary of War;

(f) That these vessels, being so under contract, did not pass to the Shipping Board, or to the custody and control of the Secretary of War, unconditionally;

(g) And that, the Secretary of War will only obtain unconditional custody and control of them when they shall have reverted to the United States, at or before the expiration of the contract existing, and here in question. Of course, it is not intended to be said, that since somebody must, in case of exigencies, act for the United States, that the Secretary of War has no power so to act.

In the late case decided by the Supreme Court of the United States, it was held that the Fleet Corporation could be sued, and that a suit against it was not a suit against the United States, within the rule that a sovereign may not be sued without its consent. (*Sloan Shipyards v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549).

This case here at bar, it is true, is not an action against the Fleet Corporation directly, but it is an action concerning vessels constructed with the funds set aside for the Fleet Corporation. Neither is it a suit against the United States, directly. On the face of it, the action is no more directly against the United States than it is against the Fleet Corporation. Indirectly, it is against the Fleet Corporation, and not against the United States.

Numerous cases, some of which are relied on by counsel for defendants as on all fours with the case at bar, are called to my attention. Generally, these cases are of the type of *Wells v. Roper*, 246 U. S. 355; *Oregon v. Hitchcock*, 202 U. S. 60; *Naganab v. Hitchcock*, 202 U. S. 473; *Stanley v. Schwalby*, 162 U. S. 255; *Louisiana v. Garfield*, 211 U. S. 70; *Louisiana v. McAdoo*, 234 U. S. 627, all of which were cases dealing with rights, property and attributes of the United States accruing to it in its strict capacity as a sovereign. These cases dealt with lands, or titles thereto, held by the United States under allodial tenure as a sovereign, with vessels (*vide*, *The Siren*, 7 Wall. 152) captured by it in war, with import duties levied pursuant to constitutional grant of power, with matters pertaining to post-offices and post-roads, and others of a similar sort had, done and transacted by the United States pursuant to constitutional grant of power in its strict governmental capacity as a sovereign.

The case of *Kaufman v. Lee*, 106 U. S. 196, where suit was brought in ejectment against Kaufman, as the officer, agent and terre-tenant of the United States, which was the owner of lands held by it in fee, as a national cemetery, and for use in some obscure way as a military reservation, and *Stanley v. Schwalby*, 162 U. S. 255, wherein a like suit to recover possession of land held for a fort by the United States, was brought against the terre-tenant, seem to illustrate the distinction.

In the former case it was said the suit could be maintained without joining the United States as a party, although the United States contended that it owned the land in controversy in fee. In the latter case it was held that the suit was one against the United States, and that it could not be maintained.

It is true the Supreme Court of the United States does not put the distinction on any such ground as that referred to above, but to me it seems that the distinction perhaps exists. The difference between the two cases, as they are distinguished by the Supreme Court in the Stanley case, is that in the Lee case the title of the United States was clearly bad, and that of the plaintiff therein clearly good; while in the Stanley case the converse was, respectively, present. Such a distinction seems unfortunate, for it would seem that, since the United States cannot be sued without its consent, no Court could ever get to the point of ascertaining whether the cause of action against it was good or bad. Having no jurisdiction to entertain the action at all, it would, by the same token, have no jurisdiction to ascertain whether the plaintiff had, or had not, a good cause of action, and the United States, the real defendant, a bad or worthless defense, which, after all is said, is the only subject of a lawsuit.

But the Lee case, *supra*, (Kaufman, the terre-tenant, alone was sued, and the United States, though it defended the action, expressly declined to submit to the jurisdiction of the trial court, though after adverse judgment below, it took an unwarranted writ of error) does hold that when the United States, acting from necessity through its officers, since it cannot function otherwise, takes the property of a citizen without due process of law, and without just compensation, and in utter disregard of right, of law and of constitutional guaranties, and so taking such property, attempts to retain it for and on the alleged behalf of the United States, the lawfulness of a possession so

acquired, and the title to property so illegally, unrighteously and unjustly obtained, may be inquired into by the courts, even though the United States be not made, and cannot be made, a party to the action in which such inquiry is had.

This is, I think, the real, legal distinction between the Lee case and the Stanley case. So, should I in haste have erred in holding that the United States is not the lessor, by the terms of the charter-party, the Lee case is yet authority for the view that, by flagrant acts of its officers, through whom it alone can function, the United States may, in a sense, be estopped from benefiting by such unlawful and unconstitutional acts.

I am of opinion, that the facts alleged in the bill, when viewed in the light of the statutory history of the alleged title to these boats in the United States, furnish a sufficient reason why the United States is not a necessary party. Everybody, of course, concedes that, if it is a necessary party, then this Court has no jurisdiction; that it cannot be proceeded against without its consent, and that this consent, it is likewise conceded, has not been vouchsafed in this case.

But even if this fact of title in the United States be conceded as being absolute, even if the Sloan Shipyards case be not controlling, the right to the possession of these boats was in the plaintiff, until that right was by wanton force interfered with, without due process of law, and in utter disregard of the law, and of its processes. Not only were the boats taken, as the petition alleges, without any process of law, but they were taken in utter disregard of the instructions of the Secretary of War, which instructions ordered defendant, Ashburn, who actually did the taking, to institute legal proceedings for their recovery, in the event that plaintiff refused to deliver them up. Such proceedings as were actually ordered by the Secre-

tary of War, would have constituted that due process of law, which the Federal Constitution vouchsafes to even the meanest of its citizens.

What was said by Mr. Justice Miller as to the facts and situation in the Lee case, particularly and peculiarly applies to the facts alleged in the petition here. That was a case, in the opinion of this Court, not nearly so flagrant as the one before me, but Mr. Justice Miller saw fit to characterize what was done in that case, in this pertinent and apposite language:

“No man,” said Mr. Justice Miller, “in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office participates in its functions, is only the more strongly bound to submit to the supremacy and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this Court is crowded with controversies of the latter class.

“Shall it be said, in the face of all this, and of the acknowledged rights of the judiciary to decide in proper cases statutes which have been passed by both branches of Congress, and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of a Government without lawful authority,

without process of law, and without compensation, because the President has ordered it, and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty, and the protection of personal rights."

But little can be added to language like this. It fits the case at bar, as the case at bar is pleaded, and with the latter, at this stage, I repeat, I am alone concerned. Certainly no Government, which with mighty hand compels its citizens to abide by the law, ought itself, in time of peace, to break its own laws, or refuse to follow itself that law which it compels others to abide by. Neither can the Government afford to take the unlawful fruits accruing from illegal acts perpetrated by those who assume to act for it, and in its name. Even if it should be conceded, for the sake of argument, that no action could be maintained by plaintiff, nor anyone else, affecting the title or possession of these vessels in dispute, or affecting the charter-party, or its construction, without the United States were a party, if defendants had come lawfully into possession of them, yet this would not at all militate against the view that a possession obtained, as here, can be examined into by the courts. Since the taking is alleged to have been done by force, and unlawfully, without due process of law, and without regard to the law, and without regard to the instructions, even of the Secretary of War, who advised, and, until lately at least, countenanced only lawful repossession, the presumption ought to be entertained, that the acts of defendant were not done by and with the consent of the United States, but, on the contrary, were done against its will and consent.

It is persuasive, that a similar view, in a very similar

case, has lately been taken by Judge Baker, United States District Court of the Northern District of West Virginia.

However, if no other reasons could be given for this view, except those of a profound respect for the law, and its processes, and a profound respect for the honor and dignity of this government, these alone ought to suffice.

Without more, I am of the opinion that the motion to dismiss on the grounds now urged by defendants, ought to be overruled, and so it will be ordered. April 30, 1923.

St. Louis, Missouri.

DISTRICT COURT OF THE UNITED STATES IN AND
FOR THE EASTERN DIVISION OF THE EAST-
ERN JUDICIAL DISTRICT OF MISSOURI.

EDWARD F. GOLTRA,

vs.

WEEKS, ET AL.,

Plaintiff,

Defendants.

No. 6639
In Equity

**ORAL OPINION OF THE COURT ON GRANTING A
DECREE FOR TEMPORARY MANDATORY
INJUNCTION.**

FARIS, J.

The question, gentlemen, has not come before the Court yet upon its merits; it has come before the Court upon an issue which, in a way, is a bald technicality. But that is not for the Court. The Court sits here to determine the questions which are presented to the Court.

The issue is made here (referring to what I have denominated as a bald technicality) that the Government of the United States is a proper party, that the Government of the United States is not made a party, and it is urged that the Government of the United States cannot

be made a party in this suit, absent its own volition, which it has not seen fit to exercise.

There are debatable questions of law in the case. There is not a single debatable question of fact in it, gentlemen. The bald facts are, that Mr. Goltra, in May, 1919, made a contract with the Government of the United States, one side says. The other side says it was made with certain individuals representing the Government of the United States. I might go further and say that the other side, that is to say, the plaintiff in the case, denies that the Government of the United States is a party. I question whether it makes much difference or not. That contract, among other things, provided (stating it substantially, because I have not got it before me), that in the event of default in the terms thereof on the part of Mr. Goltra, the Government of the United States, or the lessor, whoever it was (and I will say to you now I do not care very much) should have the option or privilege of taking these boats.

There came a day in 1922 or 1923 (at least the question of this issue became crucial in 1923) when the Government said to Mr. Goltra, "You have not lived up to your contract. You have not complied with the terms of it, and therefore we have a right to abrogate it, to cancel it, to declare it at an end, and ask of you the return of these barges."

Mr. Goltra said, "You are in error about that. I have done everything, under the circumstances, which my contract requires me to do. You have no right to take them."

Just there, gentlemen, a justiciable question arose between these parties, the same question that would arise if Jones were to say to Brown, "You have my hundred and sixty acres of land; give it to me." Brown says, "It is not your land." Jones says, "It is. I will go and take it," and Jones goes and takes it *vi et armis*. Now, that is the bald situation in the case.

There were proceedings at law, gentlemen, known of all men who are lawyers, by which the question legally could have been determined whether the contention of the lessor in this case was true or whether the contention of the lessee in this case was true.

The terms of the contract are plain. If the plaintiff, Goltra, had not complied with the contract then the Government had the right to take these boats, but the Government did not have the right, or the lessor did not have the right; nobody had the right to take them as long as it was an issuable contention between the lessee and the lessor as to whether the lessee had complied or not. Clearly, here, Colonel Ashburn, now General Ashburn, acting under the orders of the Secretary of War, took those boats without any legal authority. There is not any question about that. The evidence is too plain to quibble about it, or too plain even to discuss it for a moment. Clearly, Colonel Ashburn had no right to take them as long as there was an issue requiring the intervention of the courts to decide whether Goltra was right in his contention or whether the lessor was right in its contention. That is too plain, gentlemen. I have no patience with the mental workings of anybody, be he lawyer or layman, who would assert to the contrary.

The Secretary of War, in my opinion, had no more right to order Colonel Ashburn to take these barges and these boats, if objection were made to that taking (and the proof in this case shows that there was objection made to their taking) than any private citizen would have any right to take the horse of another if that other claimed to own that horse, or claimed the right of possession to that horse.

I am not blaming General Ashburn in the case, because General Ashburn did what I believe I would have done if I had been an officer in the United States Army and had

been requested by my superior to perform a certain duty. I should perform that duty if I could. But that does not make any difference. That simply is a sentimental question, which prevents any blame from attaching to the acts, personally, of General Ashburn. The question goes back farther than that: Did the Secretary of War have any right to take the law into his own hands and to send an officer of the United States Army to take by force; to take without authority, the property claimed by a private citizen? That question is too plain, gentlemen, for argument. Undoubtedly he had no such right.

Since the Government of the United States is not a party, since no decision of this question can be had without its presence, and since it arbitrarily refuses to come in, this situation arises: That the Government of the United States, through its officers (if the defendants' position be correct) may violate every provision of law and every provision of the Constitution that has ever been written into law, decided by the courts as being law, or written into the Constitution, and then go unwhipped of justice. All that is necessary is for some man calling himself an administrative or executive officer of the Government to assume arbitrary powers when he acts as an officer of the Government; do what he pleases touching the rights of citizens, yea, touching their constitutional rights, and then say, "I was acting for the Government. The Government is not a party. The Government will not become a party. You cannot touch me in law for that."

Now, gentlemen, that situation is unthinkable. It is unthinkable to say that an officer of the United States, be he the Chief of the War Department; be he the Chief of Engineers; be he the United States District Attorney, or be he what he may, may assume to act for the United States Government in derogation of the liberties of the people of the United States; in derogation of their constitutional rights, and then say, "You cannot touch us. The

Government of the United States ought to be a party; it is not a party, and it will not become a party. You cannot make it become a party. Therefore your constitutional rights and your liberties as free men are whistled down by the wind and go for naught."

You cannot do that in this country, gentlemen; that thing cannot be done in this country, and that day when that thing can be done in this country marks twelve o'clock for this country as a republic. There is no use in discussing that. That is the situation here.

Now, I take this position: That neither the Secretary of War, a defendant here; nor Colonel Ashburn, a defendant here; nor Mr. Carroll, who is a defendant here by courtesy, at least, but whose interest it is hard to appreciate at this stage of the case, can assume to act for the United States Government when they do things not permitted to be done by an officer of the United States Government, or to be done by the Government itself. The great Government of the United States cannot be said to be standing under cover and permitting its officers to do in its name a thing of the monstrous and outrageous character shown by the evidence in this case.

This matter came up in the case of *Lee v. United States*. I cited that case in a former opinion. In my opinion, as a lawyer and as a judge, the situation here is far more flagrant than it was there. There a man by the name of Kaufman held for the United States certain property. Other officers of the United States (not Kaufman, I believe, but others who had had something to do with the subject-matter) acted in a like outrageous way. The result of their outrageous and monstrous actions was that Kaufman was put into possession of certain property as the keeper and custodian thereof for the United States. Justice Miller, one of the greatest justices who ever sat on the Supreme Court of the United States, said that the

Government could not be said to be behind an officer, who said he was acting for it, and who assumed to be acting for it, when that officer transgressed the laws of the United States, and transgressed the Constitution of the United States.

I think that is the rule, or rules, which govern here. I may be mistaken about it. It may be true that by simply standing out and permitting (if I may use the word; which is not the correct one) an officer to do for it an unconstitutional thing, a monstrous thing, an outrageous thing, the Government of the United States may profit and prosper, but I do not believe that when an officer of the United States acts unconstitutionally, acts illegally, the United States can be said to be behind what he is doing. If the United States, then, was not behind these men (and it was not behind them unless they were doing lawful things) then the United States cannot be said to be a party.

I pass over, then, the question of title, the question of who was the lessor; whether it was the United States, or whether it was somebody else. In a former opinion, after looking at all the law I could find upon the subject, and all the statutes I could find upon the subject, I came to the conclusion that under the authority of the Emergency Shipping Board case, that the United States was not a proper party here. I am still of that view; if necessary, I shall continue to so rule. But I say to you, for the reasons that I have thus lamely given, that I doubt seriously whether it makes any difference, because (to close upon that point as I began) if officers of the United States, in the name of the United States, can do things of the kind that were here done; can arbitrarily do these things; can take the property of a citizen regardless of the courts, and without resorting to the courts, while they say to others, "You must be law-abiding. You must go

into court, you must not take the law into your own hands," then this republic cannot long endure under that species of tyranny.

A somewhat serious point of law arises in the case, gentlemen, by reason of the fact that it is somewhat unusual to ask for injunctive relief when you ask for no other relief. That is a debatable question in the case. I treat that thus: This is in the nature of a mandatory injunction, an injunction commanding the restoration of the *status quo*. I think that the law will reach it, even though it be not within the power of the Court, under the pleadings here and under the evidence here, to decide the merits of this case. The merits, I repeat, as I said in the beginning, have not been touched on in this case. I think it is within the power of a court of equity, in a case where a mandatory injunction is asked, to require those who have done an illegal thing to undo that illegal thing, and thus preserve the *status quo*. If it is not the law then the circumstances in the case presented here disclose a regrettable situation, to characterize it by no stronger word.

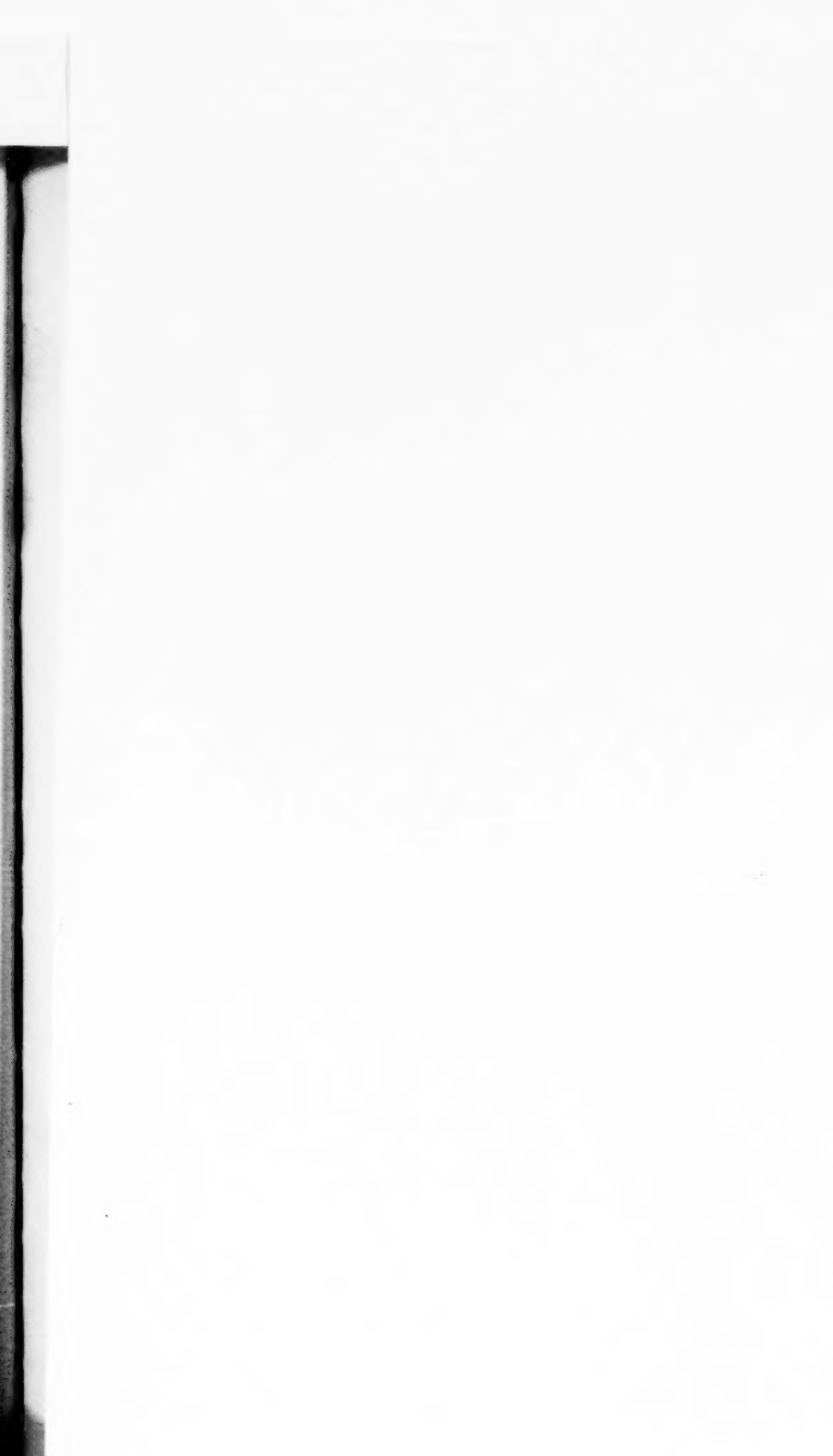
Those are the two points in the case, gentlemen. One is: Is the United States an absolutely necessary party here? I say it is not, because I think that by no stretch of the imagination can it be truly said that the United States Government is countenancing, is ordering, is urging, those who assume to act in its name to do things of this character.

Upon the other question, I think it is within the Court's power, as the Court has already said, where a mandatory injunction is asked merely for the purpose of preserving the *status quo*, to act without looking legally into the case and merits thereof. I could not get to those merits here because there is no proof offered upon either side about them.

So, I am going to issue a temporary mandatory injunction in this case, commanding the defendants in this case to restore these boats and barges to the possession of the plaintiff, Goltra, and such orders and judgments in the case as the proofs and pleadings will admit. You may prepare a decree to that end.

To which ruling of the Court, the defendants, by their counsel, then and there, at the time, duly excepted.

Which was all the evidence offered and heard on the application for a temporary injunction.



APR 3 1926

WM. R. STANSBURY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

EDWARD F. GOLTRA,

Petitioner,

vs.

DWIGHT F. DAVIS, Secretary of War
of the United States, Successor to
JOHN W. WEEKS, Secretary of
War of the United States, COL.
T. Q. ASHBURN, Chief Inland &
Coastwise Waterways Service of
the United States, and JAMES E.
CARROLL, United States District
Attorney,

Respondents.

No. 718.

BRIEF OF PETITIONER.

JOSEPH T. DAVIS,
DOUGLAS W. ROBERT,
Solicitors for Petitioner.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

EDWARD F. GOLTRA,

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vs.

DWIGHT F. DAVIS, Secretary of War
of the United States, Successor to
JOHN W. WEEKS, Secretary of
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T. Q. ASHBURN, Chief Inland &
Coastwise Waterways Service of
the United States, and JAMES E.
CARROLL, United States District
Attorney,

Respondents.

No. 718.

BRIEF OF PETITIONER.

**STATEMENT OF GROUNDS ON WHICH THE
JURISDICTION OF THIS COURT
IS INVOKED.**

This cause is in this honorable court in response to a writ of certiorari, issued to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, requir-

ing said Court to certify to this Honorable Court, for review and determination, the cause in which John W. Weeks, Secretary of War, et al., are appellants and Edward F. Goltra is respondent. Hon. Dwight F. Davis, successor to Hon. John W. Weeks as Secretary of War, has been substituted, by this Court, as respondent.

The opinions of the court below have not yet been officially reported, but are printed in the printed record of this case herewith filed and the same will be found therein. (R. 105, 126, 131.) See Federal Reporter, Second Series, Vol. 7, page 838.

The opinions were delivered, the decree and order of said Circuit Court of Appeals were filed and entered July 23, 1925 (R. 141).

The specific claims advanced, and rulings made in the lower court which are relied upon as the basis for the writ, are:

First: The majority opinion of said Circuit Court of Appeals has decided important questions of law in a way untenable and in conflict with applicable decisions of this Court and in conflict with the weight of authority, to wit:

(a) That this suit for an injunction against the Secretary of War and his subordinates to restrain them, as individuals, from committing illegal and unauthorized acts of seizing the towboats, barges and other property and commanding the return of the property already taken, which has been and was legally in the possession and control of your petitioner, could not be maintained, and

(b) That such a suit was one, in effect, against the United States which could not be maintained.

(c) That the Secretary of War had the right, in his judgment and discretion, arbitrarily to terminate said contract of lease and option to purchase, without affording the lessee an opportunity to be heard.

(d) That the judgment of the Secretary of War is not subject to judicial inquiry, decision, or review.

(e) That by reason thereof the respondents, John W. Weeks, as Secretary of War; Col. T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney, were justified in seizing, without legal proceedings, without notice, by coercion, and force of men and arms, said towboats and barges then in the possession and control of petitioner.

(f) That although the Government had, as here disclosed, entered into a commercial enterprise and was interested as a trader in a business venture for profit, still it retained its immunity from suit as a sovereign in a governmental capacity.

(g) By deciding and holding the contract of lease to be a contract with the Government and that the property was and is the property of the United States in its sovereign capacity, although the contract of lease was made with Edward F. Goltra by "Major General Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor," and designated in said lease as

“party of the first part,” and throughout refers to “him” as the lessor, and relates to and also recites the allotment of \$3,860,000 to said Chief of Engineers by the United States Shipping Board Emergency Fleet Corporation for the construction of said fleet.

(h) By interpreting clause 8 of said contract of lease and option as a forfeiture clause with power in the Secretary of War, in his judgment, to declare said contract terminated and to take, arbitrarily, and by force, said property.

Second: The majority opinion of said court has decided an important question of law in a way untenable and in conflict with the Fifth Amendment of the Constitution of the United States: “No person shall * * * be deprived of life, liberty, or property, without due process of law,” to wit: sustaining respondents’ arbitrary seizure of your petitioner’s property under circumstances as set forth in Judge Sanborn’s dissenting opinion (R. 139):

“Notwithstanding the provision in the lease and contract that William M. Black, the lessor, on non-compliance, in his judgment, by plaintiff with any of the terms of the lease and contract would be justified in terminating the lease and returning the property to the lessor,” is no grounds for “the conclusion that the acts of the defendants in this case, the notice of Honorable John W. Weeks, Secretary of War, of March 3rd, 1923, that, in his judgment, the plaintiff had not complied with the terms of the lease and contract, and his peremptory demand that the plaintiff surrender the property, his failure to give notice of

or an opportunity for a hearing before him by the plaintiff on the question of the latter's compliance with the terms of the contract, either before or after the plaintiff by his answer to the Secretary's letter of March 3rd, 1923, requested such an opportunity and hearing by his letter of March 8, 1923, the sudden, coercing seizure and taking from the plaintiff of much of this property on Sunday, and the attempt to run it beyond the jurisdiction of the court below, constituting due process of law."

Third: The majority opinion of said Court has decided important questions of federal law as set forth in the foregoing paragraphs which should be settled by this Court.

The writ, in this proceeding, was issued by virtue of Section 240 of the Judicial Code, Act of Congress of March 3, 1911, as amended by the Act of February 13, 1925. The following cases sustain the jurisdiction of this Court.

International News Service v. Associated Press,
248 U. S. 215;

City of Denver v. New York Trust Company, 229
U. S. 123;

The important questions of law herein referred to, and the conflict of opinions rendered herein by the Circuit Court of Appeals, as well as the conflict with decisions of this Honorable Court and the weight of authority warranted the granting and issuing of the writ.

The three separate opinions of said Circuit Court of Appeals in the instant case;

- (a) Opinion of the Court by Pollock, District Judge (R. 105);
 - (b) Concurring opinion by Symes, District Judge (R. 126);
 - (c) Dissenting opinion by Sanborn, Circuit Judge (R. 131);
- Ex parte, in the matter of the United States, as owner of Nineteen Barges and Four Towboats, 263 U. S. 389, 393.

STATEMENT OF FACTS.

(1) *Events leading up to the execution of contract of lease and option to purchase four tow boats and nineteen barges.*

During the war between the United States and the Imperial Government of Germany, petitioner herein, "at the request of certain Government officials, as an emergency of war, in order to increase the output of pig iron, made certain arrangements for iron ore and coal properties with a view of producing pig iron at St. Louis, Missouri," as a result of which petitioner "entered into various engagements and undertakings to increase the pig-iron supply as a war measure, which may have created, and according to the contention of the lessee (petitioner herein) did create, obligations on the part of the United States to the said lessee (petitioner herein)" (R. 4, 56). As part of that undertaking as a war measure, which was to and did involve many millions of dollars, there was through "the United States Shipping Board Emergency Fleet Cor-

poration allotted to the Chief of Engineers the sum of \$3,860,000 for the construction of a fleet of towboats and barges for the primary purpose of transporting the said iron and coal to and from St. Louis, Missouri" (R. 4, 56), and "on the 1st day of August, 1918, the Chief of Engineers of the United States Army entered into contracts for the construction of nineteen barges suitable to use for the transportation of said iron ore and coal" (R. 4, 56).

Thereafter, on November 11th, 1918, said war preparations ceased and the Government began terminating all of its war contracts and engagements with many and enormous financial obligations due said contracting parties, including this petitioner, and found itself with many millions of dollars worth of finished and unfinished property on hand for which it had no use in the administration of the governmental affairs and was forced to dispose of same to the best advantage.

Like most of its war emergency undertakings, the matter of utilizing the Mississippi River for the transportation of iron ore and coal was an experiment, and the adaptability of said towboats and barges, theoretically designed, was also experimental, and continued to be an experimental proposition and undertaking even after said boats and barges were completed (R. 4, 56, 71).

Considerations for the contract were: "To enable the Government to dispose of the said barges more advantageously" (R. 4, 56), and moving from petitioner (referring to petitioner's claim against the Government),

“which he entirely releases and discharges in part consideration of this lease, which engagements, undertakings and lease are in furtherance of the original design for the assembling of coal and iron ore at St. Louis, Missouri, and for the increase of pig iron facilities” (R. 4, 56).

The foregoing was the basis upon which the contract was made and the considerations therefor.

(2) Contract lease and option to purchase between Chief of Engineers of United States Army, designated as the lessor, and Edward F. Goltra, designated as lessee, dated May 28, 1919.

“This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra of the City of St. Louis, State of Missouri, hereinafter designated as the lessee, his heirs, executors and administrators, party of the second” (R. 4, 56).

“Now, therefore, the said lessor doth hereby charter and lease unto the said lessee for a term of five (5) years, beginning with the date of delivery, to the lessee of the first barge or towboat the following described property”; covenants and agreements (R. 4, 56):

“2. (a) That the said lessee shall operate as a common carrier the said fleet of three or four towboats

and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs, without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made, provided the Secretary of War consents to such use other than as a common carrier” (R. 4, 56).

(b) Has to do with lessee paying all operating expenses and maintaining the fleet in good operating condition to the satisfaction of the lessor; to hold the United States free from liability, etc., in connection with operation, care and maintenance; discharge maritime liens; lessee to insure, both fire and marine, in such an amount as in the judgment of the Secretary of War * * * may require * * * against physical injury to them; lessee to provide fire, marine and towers liability insurance as in the judgment of the Secretary of War, etc., insuring each against such injury as may be inflicted by such vessel upon other property, etc., and if the lessor shall require, lessee to provide \$300,000 bond to protect United States against such liability or obligations, and against maritime or other liens and against depreciation in value, etc. (R. 4, 56).

(b-1) All salvage earned * * * shall be for benefit of United States (R. 4, 56).

(c) For protection of persons furnishing materials, service and labor in connection with operation, furnishing, repair, care and maintenance, etc., lessee to furnish bond for \$200,000 (R. 4, 56).

3. "Net earnings above operating expense and maintenance for every ton of cargo moved, and other net earnings shall be turned over to Secretary of War, etc., for deposit with the Treasurer of the United States," in a special deposit account, and shall continue so to be turned over to him and so deposited by him until such time as said net earnings shall equal the full amount of the cost of the several vessels of the fleet plus interest on said cost at 4 per cent per annum computed from the respective dates of delivery of the several vessels of the fleet and that thereafter all net earnings over and above the full amount of the said cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum, shall be deposited to the credit of the Secretary of War at least every ninety days by the lessee in one or more national banks in St. Louis, Missouri, to be designated by the lessor, to be held for the fulfillment of the terms of this lease, provided that earnings derived from the transportation of commodities in barges hereby leased, moved by towboats not furnished by the United States, shall, until all vessels of the government fleet are delivered to the lessee, be subject to deduction of cost of the hire of the necessary towboats to move said barges, in addition to

any other operating expense and maintenance in connection therewith (R. 4, 56).

Lessee to keep accurate account, "and his accounts shall at all times be subject to inspection by the lessor" (R. 4, 56).

4. Provides for selection of national bank depositories.

5. (Option to Purchase). "Within three months prior to the expiration of the lease, or of any period of renewal, or sooner if so desired by the lessee, a board of three persons shall be appointed, one to be designated by the lessor, one by the lessee and one by the said two members unless they shall fail to agree, in which case the third member shall be appointed by the Secretary of War, all of whom shall be familiar with the construction and cost of river vessels of steel and with the current market values thereof, to appraise the value of the said fleet at that time, and the said lessee shall be given the option of purchasing the fleet upon the following terms:

"(a) If the funds turned over to the Secretary of War and deposited by him with the Treasurer of the United States, under section 3 of this lease, shall aggregate a sum equal to the full amount of the cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum as aforesaid, then in case of the exercise of said option by the lessee said funds shall be applied to payment in full for the fleet, and any net earnings over and above the amount required for such payment on deposit in said bank or banks, provided in section 3 of the

lease, or otherwise held on deposit, shall be paid to the lessee.

“(b) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, under section 3 of this lease, shall be less than the full amount of the cost, plus accrued interest at the rate of 4 per cent per annum on such cost, but greater than the appraised value, the funds shall in said event be applied to payment of the fleet at the appraised value, and any amount in excess of the appraised value shall be retained by the Secretary of War for the use and benefit of the United States; and the fleet shall thereupon become the property of the lessee.

“(c) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, as provided by section 3 of the lease, shall be less than the appraised value, then in the event aforesaid such funds shall be applied to the payment of the fleet so far as they shall reach, and the lessee shall pay in addition thereto, in the manner specified in section 6 thereof, the amount whereby the aggregate funds so turned over to the Secretary of War fall short of the said appraised value (R. 4, 56).

“6. It is further covenanted and agreed that the method of payment of any amount which the purchaser shall be required to pay, and not provided for out of the sums deposited to the credit of the Secretary of War shall be as follows:

“There shall be sixteen (16) payments. The first shall consist of all moneys on deposit to the credit of the Secretary of War, as indicated above, and shall be so applied at the date of the sale. The lessee shall execute for the balance fifteen (15) promissory notes, in equal amount, payable at the expiration of one year, two years, three years, etc., from date of sale with interest at 4 per cent per annum. Title to the property shall remain in the United States until the payment of the whole of the purchase price of said property.

7. “Lessee assumes full responsibility for all employes, plant and material, boats and barges and for damage or injury done to or by them (R. 4, 56).

8. “The lessor reserves the right to inspect the plant, fleet and work, at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employes are promptly paid, monthly or oftener; and non-compliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and tow-boats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels” (R. 4, 56).

The contract is signed:

“William M. Black, Major General, Chief of Engineers, U. S. Army, (First Party)—
Edward F. Goltra (Second Party).”

Memo:

At the end of the contract is a written memo. in part as follows:

“It is further understood and agreed between the said William M. Black, Chief of Engineers, United States Army, and Edward F. Goltra, Parties of the First and of the Second Part respectively” (R. 10, 56).

(3) *Supplemental contract between Chief of Engineers of United States Army, designated as lessor, and Edward F. Goltra, designated as lessee, dated May 26, 1921.*

“Whereas, on the twenty-eighth day of May, 1919, a contract was entered into between Major General W. M. Black, Chief of Engineers, U. S. Army, who, as well as his legally appointed successor, is hereinafter designated as the lessor, representing the United States of America, of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, his heirs, executors, administrators, or assigns, hereinafter designated as the lessee, of the second part, for chartering and leasing unto the lessee for a term of five years, subject to renewals, nineteen (19) barges and four (4) towboats, belonging to the United States.

“And whereas, it is found advantageous and in the best interest of the United States to modify the said contract as hereinafter specified for the following reasons:

“To more fully provide for the operation of the said barges and towboats as a common carrier by providing

unloading facilities at St. Louis, Missouri, by the use of funds remaining from the allotment of \$3,860,000.00 from the United States Shipping Board Emergency Fleet Corporation, and to provide for the sale of the said unloading facilities to the lessee under certain conditions.

“Now, therefore, the said contract is, by this supplemental agreement between Major General Lansing H. Beach, Chief of Engineers, U. S. Army, and the said contractor, on this 26th day of May, 1921, hereby modified in the following particulars, but in no others:” (R. 57)

Among other things therein, it is provided that “Lessee, at his own expense, will provide the necessary tract of land and runway on which the said unloading facilities are to be erected—said tract to be selected by the lessor, subject to the approval of the lessee.

Lessee to provide insurance (R. 57).

“The items of the original lease as to inspection (paragraph 8) shall govern so far as applicable and pertinent, etc.”

“The lessee will, at his own expense, within eight (8) months from the date hereof, provide the necessary tract of land and runway on which the said unloading facilities are to be erected, stand and operate, said tract to be selected by the lessor, subject to approval by the lessee and said runway to be built according to plans submitted by lessee and approved by the lessor.

“The lessor will erect on the said tract of land an unloading apparatus or facilities of a kind and char-

acter mutually agreed to by lessor and lessee as sufficient and adequate to handle the cargoes to be transported by the said barges and towboats.

“The said lessee shall, at his expense, maintain and operate the said unloading facilities in connection with the barges and towboats as a common carrier, subject to such charges for services of loading and unloading as may be approved by the Secretary of War.

“The said lessee shall take out and maintain for the benefit of the United States insurance in such amount and with such companies as may be approved by the lessor.

“The terms of the original lease as to net earnings (paragraph 3), appraisalment and option to purchase, and conditions of purchase (paragraph 5), method of payment in the event of purchase (paragraph 6), inspection (paragraph 8), shall govern so far as applicable and pertinent to the said unloading facilities.

“In case the said lessee, his heirs, administrators, executors or assigns, does not take over and pay for the said unloading facilities according to the aforesaid terms, then and in that case the lessor may, without let or hindrance by the said lessee, his heirs, administrators, executors or assigns, take said unloading facilities in the same manner as is provided in the original lease as to the barges and towboats, or

“In case the lessor does not desire to remove the said unloading facilities under the preceding paragraph, the lessor shall have the right to lease the land and runways on which the unloading facilities stand, for five (5) years with the privilege of renewals, the terms of such lease, if not mutually agreed to by the lessor and lessee, to be fixed by a board of

three persons, one member to be selected by the lessor, one member by the lessee, and one member by agreement between the two aforesaid members.

“This supplemental agreement shall be subject to the approval of the Secretary of War (R. 57, 58, 59).

“In witness whereof, the parties aforesaid have hereunto placed their signatures at the time of execution of this agreement (R. 59).

Witnesses:

P. J. Dempsey as to Lansing H. Beach
Major General, Chief
Engineers.

 as to
Thomas M. Robins as to Edward F. Goltra
Major, Corps of Engi-
neers as to

(Executed in Triplicate.)

Approved.....192

.....
Major General, Chief of Engineers, U. S. Army.
Approved: May 27, 1921.

J. M. Wainwright,
Assistant Secretary of War.”

Contract Executed:

All of the terms and conditions precedent specified in said contract and supplemental contract were strictly and duly complied with on the part of the lessee, and on July 15, 1922 (R. 71) said lessor, the Chief of Engineers of the U. S. Army, turned over and delivered said boats and

barges thereunder to petitioner herein, after petitioner herein had secured, at his own expense, and turned over to the Chief of Engineers, fire, marine and liability insurance, and bond in sum of \$200,000 (R. 69).

After the delivery of said boats and barges the lessee was obliged, at large expense to himself, to make certain changes, alterations, and repairs thereon before same was adaptable for transportation service on the river (R. 71).

On March 25th, 1923, and prior thereto said contract and supplemental contract were completely executed by both parties thereto, and said lessor therein had duly and completely turned over and delivered all of said property to petitioner herein as his property for a term of five (5) years with option in him to purchase, and petitioner was in possession (R. 4, 69, 56, 71).

The petitioner had, in all respects, fully complied with all terms and conditions of said contract and supplemental contract (R. 68, 69).

(6) Government Barge Line Service on Mississippi River.

For some time prior to March 2, 1921, the Government barge line was operated on the Mississippi River, and engaged in the transportation of commodities for shippers in the Mississippi River Valley at rates of 80 per cent of the all-rail rates (R. 59).

The Government Barge Line, operated under the name of the Mississippi-Warrior Service (R. 65). These opera-

tions were under the officials of the Inland and Coastwise Waterways Service (R. 65).

During the year 1923 Col. Ashburn was chief of the Inland and Coastwise Waterways Service (R. 83).

The Inland Waterways Corporation, under Act June 3, 1924 (Fed. Stat. Anno. Supp. 1924, p. 185), became the successor to the Mississippi-Warrior Service, and to the Inland and Coastwise Waterways Service. All boats and barges were transferred, by this act, from the Secretary of War to the Inland Waterways Corporation, and the act provides that said Corporation may sue and be sued.

Col. Ashburn became and now is chairman of the board and the executive of the Inland Waterways Corporation (R. 83).

(7) Acts of parties to contract of lease and option to purchase during period of construction of boats and barges in anticipation of delivery thereof to Goltra.

On March 2, 1921, Mr. Goltra requested the Chief of Engineers of the United States Army, as lessor, to secure authority for him to quote "the same rates as obtain on the Government Barge Line now operated on the lower river, viz., 80 per cent of the all-rail rate" (R. 59).

This authority as to rates was granted by the Secretary of War on March 4, 1921 (R. 60). This authorization was denied on March 31, 1922, as not having been approved on the grounds that the Secretary of War would approve no operation on the lower Mississippi "that would enter into

competition with the established line of barges" (R. 62). Under date of April 28, 1922, Mr. Goltra transmitted a letter to the Secretary of War, through the Chief of Engineers of the United States Army, as lessor, therein referring to a conversation previously had relative to the contract and operations thereunder, and in which he informs the Secretary of War: "Acting in good faith upon same, I obligated myself to transport hundreds of thousands of barrels of oil in bulk from New Orleans to Roxana, Illinois; also I have obligated myself to transport coal from Kentucky to St. Louis, up to 2,000 tons a day; I have also agreed to transport manganese ore from New Orleans to the blast furnace at St. Louis," at 80 per cent of the prevailing rail rate (R. 63, 64). To this letter the Secretary of War replied, May 6, 1922, as follows: "The consent and approval of the Secretary of War heretofore, on the 4th day of March, 1921, given to the operation by you of the vessels covered by and included under the provisions of said contract, at transportation rates equal to 80 per cent of the prevailing rail tariffs, is hereby withdrawn and canceled as to any and all contracts, agreements and undertakings for transportation on the Mississippi River and its tributaries below the City of St. Louis, Missouri, hereafter made and entered into by you" (R. 64). On May 25, 1922, the Secretary of War authorized a rate of 80 per cent of the all-rail rate for the transportation of a limited list of commodities, viz.: "Liquid in bulk, including liquid asphalt or road oil, in drums; coal, lumber,

sulphur, ties, cement, salt, sand, gravel, crushed rock; and grain over and above the capacity of the Mississippi-Warrior Service to handle such commodity," and therein further admonished that Mr. Goltra shall not engage in such commodities as to stifle the success of the Mississippi River Service (R. 65, 66).

Acts Subsequent to Delivery of Boats and Barges.

The boats and barges were delivered to Mr. Goltra on July 15, 1922; thereafter tests were made; great trouble was encountered in making sufficient steam with coal; one of the towboats, the Illinois, was then converted from a coal to an oil burning boat; these tests and changes caused delays; Mr. Goltra then proceeded to Caseyville, Kentucky, with the towboat, Illinois, and four or more barges, about August 15, 1922, for a cargo of coal and returned to St. Louis about September 15, 1922; about October, 1922, the towboat and barges were taken to Hannibal, Missouri, for a tow of 3,000 tons to be transported to St. Louis. The navigation season ended about December 15, 1922, and remained closed until about March 1, 1923, on account of the winter (R. 70, 71).

(8) *Events leading up to the seizure of the boats and barges on Sunday, March 25th, 1923.*

Without notice and without an opportunity to be heard (R. 68, 69), on Sunday, March 4, 1923, in the City of Washington, D. C., Mr. Goltra was presented with a let-

ter from the Secretary of War, dated March 3, 1923, by Col. Ashburn (R. 83), undertaking to cancel the contract of lease and option to purchase under authority claimed under paragraph eight (8) of the contract for the following stated reasons: "You are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier and in other particulars," and therein directed the immediate delivery of possession of the boats and barges and unloading facilities to Col. T. Q. Ashburn, Chief Inland and Coastwise Waterways Service (R. 67). Attached to this letter was a letter of instructions by the Secretary of War to Col. Ashburn, which provided: "In the event of his failure or refusal to make delivery of the property demanded, you will apply to the United States District Attorney at St. Louis, requesting the institution of legal proceedings for the recovery of said property" (R. 67). Col. Ashburn then proceeded to St. Louis and demanded that Mr. Goltra comply with the foregoing demand by 6 o'clock p. m., Thursday, March 8, 1923 (R. 68); on March 8, 1923, Mr. Goltra replied, in writing to the Secretary of War, declining to comply with the demand, stating that "I have, in the face of most unjust interference and restrictions, fully complied with all of the terms of my contract, and further, I have complied with every demand or requirement made of me by either you or the Chief of Engineers of the United States, the lessor named in my con-

tract," and further stated, "The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has in fact no substantial basis on which to rest. This, I believe, will be fully demonstrated to you if I am granted a fair and impartial hearing to which as a citizen I am entitled, and which, in fairness and justice, I now request" (R. 68). No reply was ever made to this letter.

Conferences With U. S. District Attorney and Department of Justice.

This petitioner, through his attorneys, conferred with the United States District Attorney for the Eastern District of Missouri, March 7, 1923, relative to the letter served on petitioner dated March 3, 1923 (R. 80, 100). The District Attorney had been consulted by Col. Ashburn and others with reference to taking some legal procedure for the purpose of taking possession of the boats and barges (R. 81). Col. Ashburn had consulted the United States District Attorney in his office and was accompanied by Mr. Cole and Judge Lovett, representatives of the Department of Justice on March 6th or 7th (R. 100). The District Attorney stated that it was his opinion that Col. Ashburn and Mr. Weeks were justified in seizing the boats and barges by force, if necessary (R. 81), and that he did not know what court action Col. Ashburn and Mr. Weeks could take following the termination of the contract, and that if they seized the boats, Goltra would have

a remedy by way of injunctive relief, but that it would be burdensome to Mr. Goltra, because he would have to furnish a tremendous bond (R. 81). The District Attorney suggested that Mr. Goltra compromise (R. 99).

A second conference was had between Mr. Goltra's attorney and the District Attorney, upon the latter's invitation of March 10, 1923 (R. 81, 101). The District Attorney was still in doubt as to the procedure, and again suggested compromise (R. 81); that at least one-half of the fleet be turned over by Mr. Goltra to the Government (R. 100). That he had resigned as District Attorney and had informed Col. Ashburn that he would not take up the problem unless retained privately (R. 99). That he had succeeded in making arrangements, satisfactory to himself, to be employed privately by these people, and that if he succeeded in delivering these boats and barges he would be retained as counsel for the Mississippi-Warrior Service, and that it was the intention of the Mississippi-Warrior Service, within about two years, to have all of these boats and barges turned over to private interest or private parties (R. 81, 82). Later, he represented, in this action, the Mississippi Valley Association (R. 100).

On March 11 or 12, 1923, another conference was held with the District Attorney and Mr. Cole of the Department of Justice, at which time Mr. Goltra's attorney was told that they were going to take the fleet. After directing their attention to Col. Ashburn's instructions from the Secretary of War relative to taking legal proceedings, they

stated that the Government was not going to bother itself about bringing any suits, and that if there were any to be brought Mr. Goltra had to bring them. They were going to throw the burden on Mr. Goltra. Compromise was again suggested (R. 82, 83).

Further Acts by Col. Ashburn Before Seizure.

After Col. Ashburn and Mr. W. L. Cole, one of the Assistant Attorneys-General of the United States, had conferred with the District Attorney at St. Louis, at which conference it was decided that they did not know how to proceed through an order of court to get possession of the barges and that it would be proper to seize the boats, Col. Ashburn and Mr. Cole returned to Washington (R. 95). Col. Ashburn was strongly in favor of seizing the boats and barges and recommended to the Assistant Secretary of War that an order be issued directing him to seize the fleet (R. 95). On the afternoon of March 22, 1923, Col. Ashburn went to the office of the Assistant Secretary of War for the specific purpose of obtaining an order to seize (R. 94). At that time, he was given the order to seize, dated March 22, 1923, executed by the Assistant Secretary of War (R. 84). Immediately thereafter, Col. Ashburn, Chief Inland and Coastwise Waterways Service, telegraphed his subordinates, "who were operating the Mississippi-Warrior Service, to have the towboat Vicksburg" meet him on the morning of the designated date (R. 84). The designated date was Sunday morning, March 25th, 1923 (R. 97).

(9) *The seizure of the boats and barges at St. Louis, Missouri, Sunday, March 25th, 1923.*

Col. Ashburn wired Mr. J. P. Higgins, an employe of the Mississippi-Warrior Service from Birmingham (R. 96), to meet him in St. Louis, Sunday morning (R. 97). Mr. Brent, manager of the Mississippi-Warrior Service, telegraphed Mr. C. E. Patton, river captain and superintendent of the Mississippi-Warrior Service, to meet Col. Ashburn in St. Louis, on Sunday morning (R. 98).

Mr. Higgins and Capt. Patton met Col. Ashburn at the station where Col. Ashburn informed them of the contemplated seizure (R. 97). No notice was given to Mr. Goltra. Col. Ashburn notified nobody because he did not want to be interfered with. "I thought, if I exercised secrecy about it, I would get the boats in the possession of the United States without any interference, which I desired to do" (R. 96).

Immediately upon reaching the steamer Vicksburg, one of the Mississippi-Warrior Service towboats, Col. Ashburn directed the captain to get up steam and seize the Goltra boats (R. 84). The first seizure of part of the fleet took place between 8 and 9 o'clock Sunday morning (R. 85). Captain Simmons was in charge of this part of the Goltra fleet, and when Col. Ashburn undertook to seize, Captain Simmons started ashore to notify Mr. Goltra, but was restrained by Col. Ashburn and Captain Patton (R. 69), and was informed by Col. Ashburn: "I told

him it was immaterial to me whether he got in touch with Mr. Goltra or not; that the order required me to take peaceful possession of the boats. I told him I wished he would not interfere or get in touch with Mr. Goltra, because it might cause me to disobey my orders or fail to carry them out" (R. 84). He threatened the chief engineer on the Goltra boat with physical violence, and threatened the captain with jail (R. 85, 69). Coercion and threatened force were used in the seizure (R. 69, 72, 74, 75, 76, 78, 79, 80, 85, 86). A large force of men was used by Col. Ashburn in making the seizure (R. 70, 72, 75, 79). Police officer resisted by Col. Ashburn (R. 74, 76). Firearms in evidence (R. 70, 72, 79). Although demanded, Col. Ashburn refused to give Goltra's representatives a copy of the alleged order of the Assistant Secretary of War under which he claimed to have been acting (R. 69, 74, 77).

Goltra's attorneys drew the bill of complaint Sunday afternoon (R. 77). Temporary restraining order and order to show cause were issued Sunday, March 25, 1923, by Hon. C. B. Faris, Judge of United States District Court for the Eastern District of Missouri (R. 26, 27). Col. Ashburn was advised by Mr. Wallace, representative of Mr. Goltra, Sunday afternoon, March 25, 1923, while Col. Ashburn was in the act of seizing more of the fleet, that a bill praying for an injunction against him was being prepared and would be served upon him. Thereupon Mr. Wallace was ordered off of the boats and barges by Col. Ashburn

(R. 80, 87). Col. Ashburn continued the seizure, and removed all seized boats and barges from the Missouri shore to the Illinois shore about six miles south of St. Louis (R. 85-87). Col. Ashburn took the boats and barges to the Illinois shore side "because I was directed to seize these barges, and I thought that if I had them over on the Illinois side I could arrange my tows and barges in such a way as to get them conveniently down the river. I was also of the opinion that if I got them over to the Illinois side, the Court here would have no jurisdiction" (R. 95). After seizing the four towboats and seventeen barges, he proceeded down the river to Cairo, Illinois, with the intention of keeping them out of the jurisdiction of the United States District Court for the Eastern District of Missouri (R. 96). Col. Ashburn was served with summons and order of Court on March 26, 1923, which he tried to evade (R. 73). He was served again as he was proceeding down the river on March 27, 1923, and again tried to prevent and evade service (R. 73, 75, 77). Col. Ashburn ignored the restraining order and seized more of the fleet after service (R. 77, 27, 28). They retained possession of these boats and barges after the seizure until about July 26, 1923, when they were brought back into port (R. 71). At the time of seizure, the fleet was docked at St. Louis for the winter (R. 70, 71). The fleet was seized for and on behalf of the Mississippi-Warrior Service for use in transporting commodities in connection with its barge line (R. 81, 98).

In June, 1923, on motion of the United States in the

Supreme Court of the United States, a writ of prohibition was prayed against Hon. C. B. Faris, a judge of the United States District Court for the Eastern District of Missouri. See: *In the Matter of the Petition of the United States of America as Owner of Nineteen Barges and Four Towboats*, 263 U. S. 389.

Pursuant thereto, upon an ex parte petition and an ex parte hearing in vacation of the Supreme Court of the United States, and upon vacation order issued by said Court thereon, Col. Ashburn again took possession of said boats and barges about August, 1923, and retained the same until on or about the 11th day of July, 1924 (R. 44, 71); and the said boats and barges were used in connection with the Mississippi-Warrior Service, but only the steamer, Illinois, of the four towboats, was used with the exception that the steamer Iowa was used for a few trips. The steamers Missouri and Minnesota were never used by the Mississippi-Warrior Service although in their possession (R. 71).

It required an order of the District Court, July 7, 1924, in the nature of an order to show cause why the defendants (respondents here) should not be punished for contempt before said boats and barges were returned to Mr. Goltra (R. 44). Said boats and barges, by virtue of the order granting the temporary injunction September 4, 1924 (R. 44), the decree of the Circuit Court of Appeals (R. 141), and the order modifying said order (R. 147), are now in the possession of the petitioner herein, and

since District Judge Faris, in September, 1924, ordered the boats and barges returned to the petitioner herein, and permitted and ordered their operation, said petitioner herein has been operating the same continuously to their full capacity in the transportation of all kinds of grain, ore and coal, and has commitments for future full capacity operations (R. 143, 144).

ASSIGNMENT OF ERROR.

The United States Court of Appeals for the Eighth Circuit erred in the following particulars:

1. In holding that this cause is a suit against the United States Government and that the Government is an indispensable party, and that unless the Government shall enter its appearance no decree as prayed in the bill of complaint may enter.

2. In holding that the complainant could not proceed in equity against officers of the Government for illegal and arbitrary interference with the rights of the complainant acquired under the lease.

3. In holding that the lease was made by the United States Government and that the title to the boats and barges was in the United States Government.

4. In failing to hold that as the United States Government had entered into a commercial enterprise, and is interested as a trader in a business venture for profit, it cannot retain its immunity from suit as a sovereign in a governmental capacity.

5. In holding that the contract for the lease of the barges reserved to the Government the right, obligation, duty and power to cancel and abrogate the lease if, in the judgment of the Secretary of War, the lessee was not complying with any of the terms or conditions of the lease.

6. In holding that the so-called specific breach of the lease (failure to operate as a common carrier), cited in the letter of the Secretary of War, March 3rd, declaring the contract terminated, is admitted by the bill and fully established by the evidence.

7. In failing to hold that the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri had authority, in the exercise of its judicial discretion, to issue a temporary injunction to hold the vessels temporarily until there could be a hearing and decision.

SUMMARY OF POINTS AND AUTHORITIES.

I.

This is not a suit against the Government of the United States, and the United States is not a necessary party thereto:

State of Colorado v. Toll, decided May 11, 1925,
69 Adv. Op. 581, 45 S. C. Rep. 505;
United States v. Lee, 106 U. S. 196;
Shipping Board Cases, 258 U. S. 549;
State of Colorado v. Toll, 15 S. Ct. Reporter, June
1st, 1925, page 581;
Stanley v. Schwalby, 147 U. S. 508, l. c. 518, also
523, dissenting opinion of Field, J.;
Belknap v. Schild, 161 U. S. 10, l. c. 19;
Tindal v. Wesley, 167 U. S. 204, l. c. 213;
Ex Parte Young, 208 U. S. 123, l. c. 151;
Philadelphia v. Stimson, 223 U. S. 605, l. c. 619;
Louisiana v. McAdoo, 234 U. S. 627, l. c. 629.

II.

The United States District Court for the Eastern District of Missouri, as a court of equity, had jurisdiction and authority to restrain these respondents, even though they were officers of the United States, from wrongful and unwarrantable interference with property of the petitioner herein in an arbitrary, unwarranted and illegal manner, and such relief to your petitioner cannot be de-

feated upon the ground that the suit is one against the United States:

State of Colorado v. Toll, *supra*;
Osborn v. The Bank of the United States, 9 Wheat.
738;
Noble v. United River Logging Railroad Co., 147
U. S. 165;
Philadelphia Co. v. Stimson, 223 U. S. 605, 613, 619;
Lane v. Watts, 234 U. S. 525;
Payne v. Central Pac. Ry. Co., 255 U. S. 228, 231;
American School of Magnetic Healing v. McAn-
ulty, 187 U. S. 94, l. c. 110.

III.

Where the Government of the United States has entered into a commercial enterprise and is interested as a trader in a business venture for profit, it cannot retain its immunity from suit as a sovereign in a governmental capacity:

Bank of United States v. Planter's Bank of
Georgia, 9 Wheat. 904;
Bank of Kentucky v. Wister, 2 Pet. 318;
Briscoe v. Bank of Kentucky, 11 Peters 257, 323;
Louisville R. R. v. Letson, 2 How. 304, 308;
South Carolina v. United States, 199 U. S. 43;
Shipping Board cases (*supra*);
Sec. 201 (e) of the Transportation Act of 1920.

IV.

The contract of lease and option to purchase is not a contract with the Government of the United States in its sovereign capacity.

Shipping Board cases (*supra*).

V.

It is within the jurisdiction of the United States District Court, in the exercise of its judicial discretion, to grant the temporary injunction to hold the vessels temporarily until there could be a hearing and decision, and with this discretion the Court of Appeals should not have interfered.

Denver & Rio Grande R. R. Co. v. United States,
124 Fed. 156;
Stearns Roger Mfg. Co. v. Brown, 114 Fed. 939.

VI.

The decision of the court below in sustaining the appellants below deprives the petitioner of his property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

VII.

Clause 8 of the contract of lease does not warrant the construction placed thereon by the court below to the

effect that it is a forfeiture provision granting to the Secretary of War, who is not designated therein, the power to terminate said contract, at his discretion or in his judgment, in an unwarranted and arbitrary manner, and thereby seize the property of the petitioner herein.

- Shipping Board cases, 258 U. S. 549;
- 6 Ruling Case Law, 906, Sec. 291;
- 3 Story's Equity Jurisprudence;
- Chapt. XXXVII, 14th Ed., 1918, Sec. 1728;
- Phil. W. & B. R. Co. v. Howard, 13 How. 307;
- Hartman v. C. B. & Q. R. Co., 182 S. W. 148;
- United States v. U. S. Engineering & C. Co., 234 U. S. 236;
- Dist. of Columbia v. Cambden Iron Works, 181 U. S. 455;
- Cheney v. Libby, 134 U. S. 69;
- United States v. Peck, 102 U. S. 64;
- United States Harness Co. v. Graham, 288 Fed. 929.

ARGUMENT.

The Court of Appeals, in the majority opinions (R. 105, 126), decided that this suit is one against the United States and that no decree can be entered unless the Government shall enter its appearance (R. 118). The decision is based upon six grounds, viz.:

That the Secretary of War was acting within the scope of his power in declaring the lease void.

That the lease contained a provision reserving to the Government the right to abrogate the lease if, in the judgment of the Secretary of War, the lessee was not complying with its terms.

That the vessels were the sole property of the United States.

That the lease contract was made by and with the United States.

That the allegations in the bill control.

That the petitioner admitted the breach and that there was neither allegation nor testimony that he had performed.

The salient omissions in the majority opinions are:

The property rights of the petitioner, of which he was deprived without due process of law.

That a citizen may maintain an action against officers of the Government to restrain an arbitrary or illegal interference with his rights even though they claim to be acting under the authority of their office.

The devolution of the title to the vessels, which was not in the United States.

That the lease was not made by the United States Government or the Secretary of War, but with the Chief of Engineers, described as "the lessor."

That the forfeiture clause does not relate to the operation of the vessels.

That the vessels were operated as a common carrier by the lessee excepting when the petitioner was prevented by the acts of the Secretary of War.

That the Government had stepped down from its place as a sovereign, and was engaged in a gainful pursuit as a trader, and could not, as such, claim the immunity pertaining to sovereigns.

That it was within the judicial discretion of the District Court to grant the temporary injunction to hold the vessels temporarily until there could be a fair hearing and that such discretion should not have been interfered with by the Court of Appeals unless the District Court had acted improvidently, illegally or abusively.

These acts of commission and omission will be taken up in the course of this brief.

It is obvious that the bill, drawn hurriedly, upon Sunday, could not have been drawn with the same degree of accuracy as to the language used and in stating clearly all of the facts. The bill, however, as a whole does state the facts with sufficient accuracy and definiteness to enable the District Court to act upon, and the bill as a whole, in substance and form, clearly indicates and shows that this is not an action against the United States, and that the United States is not a necessary party for the purpose of

the District Court granting the necessary and substantial equitable relief prayed for.

This is not an action for specific performance, but is an action for the purpose of maintaining and restoring the private rights and property rights under an executed contract. Nor can this action be construed to be one to divest title to property, but is one to restore possession of the same and to place the parties in the same position in which they were before the alleged unlawful acts of the defendants changed that status.

All conditions precedent having been complied with by both parties to the contract up to and at the time of the delivery of the property to the petitioner, and, under the granting or charter clause all property and possessory rights being definitely and expressly fixed and vested, the contract in respect thereto was executed and left no property rights to be divested out of the United States.

The executory part of said contract pertains merely to certain covenants as to future obligations, rights, privileges, declaration of purposes and option to the petitioner to purchase.

It really makes no difference what language was used in describing the contract in the hurriedly drawn bill. The contract itself is before the Court, and shows clearly that it was not made by the United States Government as lessor. It really makes no difference whether or not the United States Government is the ultimate beneficial owner of the boats and barges. Mr. Goltra had acquired posses-

sion of these boats and barges through a valid contract, and it was the unlawful interference with his right by the defendants which he sought to restrain. It really makes no difference whether that contract was made by the Chief of Engineers as lessor or the United States Government as lessor. No matter who was the lessor the property was lawfully in the possession of Goltra and no person, whether officers of the United States Government or private citizens, had the right to interfere with that lawful possession. As was said by Judge Faris in his last opinion (R. p 49):

“But I say to you, for the reasons that I have thus lamely given, that I doubt whether it makes any difference, because if officers of the United States, in the name of the United States, can do things of the kind that were done here; can arbitrarily do these things can take the property of citizens regardless of the courts, and without resorting to the courts, while they say to others, ‘you must be law-abiding. You must go into court, you must not take the law into your own hands,’ then this republic cannot long endure under that species of tyranny.”

POINTS I, II, III, IV AND V.

This is Not a Suit Against the United States, and the Court Had Power to Restrain the Unauthorized Acts of Officers.

The dissenting opinion of Sanborn, Circuit Judge, in this case (R. 131), is a clear exposition of the law and the

facts. In that will be found all of the questions, many of which are not referred to in the majority opinions. Each one is carefully reviewed and answered. It is a potent argument in favor of the petitioner. It remains only for us to point out the errors in the majority opinions.

The majority opinions of the Court of Appeals are directly in conflict with a number of decisions of this Honorable Court, the latest one, which we are able to find is that of *State of Colorado v. Toll*, 268 U. S. 228. That case involved Government property, through which state roads ran. The District Court dismissed the bill brought by the state and this Court said:

“The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States (*Missouri v. Holland*, 252 U. S. 416, 431; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 619, 620.”

The majority opinions place much reliance upon the case of *Wells v. Roper*, 246 U. S. 335 (R. 122, 124, 129).

A careful reading of this case will disclose an entirely different state of facts and that it is not applicable to the case at bar.

In that case, based upon a contract with the Postmaster General acting for the United States, in its gov-

ernmental capacity, the contract provided specifically that the Postmaster General or the First Assistant could terminate the contract under this stipulation; "any and all of the equipment contracted for herein may be discontinued at any time upon ninety days' notice from the said party of the first part" and the "Postmaster General notified plaintiff in writing that it was essential for the purpose mentioned that his contracts should be cancelled, etc."

Furthermore, it will be noted in that case, that in so doing the Postmaster General was acting in an official capacity under a specific appropriation of Congress for the very purpose contemplated in said contract wherein he was given discretionary power under the appropriation.

"Then the Postmaster General, acting under a provision of an appropriation act approved March 9, 1914, Chap. 33 etc., **by which he was authorized in his discretion to use such portions, etc.**"

The Court of Appeals also relied upon the case of *Noble v. Union River L. R. Co.*, 147 U. S. 165 (R. 123, 128), but it is apparent that in so doing it assumed that the Secretary of War was acting in a judicial or discretionary capacity though there is absent any authority so to act, in either the lease or the contract, and the contention here is, as in that case, that his acts were ultra vires. In fact the majority opinion is in conflict with the opinion in the

case of *Noble v. Union River Co.*, *supra*, for it is there held:

“This was a bill in equity by the Union River Logging Railroad Company to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from executing a certain order revoking the approval of the plaintiff’s maps for a right of way over the public lands, and also from molesting plaintiff in the enjoyment of such right of way secured to it under an Act of Congress.” * * *

“We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a *mandamus* if he refused to do an act which the law plainly required him to do.” * * *

“It was not competent for the Secretary of the Interior thus to revoke the action of his predecessor, and the decree of the Court must, therefore, be affirmed.”

The opinion holds that the case of *Philadelphia Co. v. Stinson*, 223 U. S. 605, is not in point (R. 128), because the complainant there “did not ask the Court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made.” And the opinion further states that, “The converse is true in the case at bar.” By this ruling

the conflict with the case of *Philadelphia Co. v. Stimson*, *supra*, is apparent. The authority to cancel the lease is challenged here, the complainant contending that the Chief of Engineers alone had the discretion and that even he could not abrogate the lease for the reasons given in the letter of the Secretary of War, March 3, 1923 (R. 67). In *Philadelphia Co. v. Stimson*, *supra*, though the plaintiff was denied his claim on the facts pleaded, the right to bring the proceedings against the Secretary of War was fully sustained, and the suit by way of injunction was held to be in personam, and was not against the United States. That case was an appeal from a decree sustaining a demurrer to a bill to set aside certain harbor lines so far as they encroach on complainant's land, and to restrain the Secretary of War from causing threatened criminal proceedings to be instituted against complainant for reclamation and occupation of land outside of the prescribed limits.

The defendant (Secretary of War), made the point among others:

"1. This proceeding is virtually a suit against the United States."

The opinion was by Mr. Justice Hughes, and on page 619, the Court said:

"First: If the conduct of the defendant constitutes an unwarrantable interference with property of the

complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded (citing many cases). And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments (*Osborn v. Bank of United States*, 9 Wheat. 738, 843, 868, and many other authorities). And it is equally applicable to a federal officer acting in excess of his authority or under an authority not validly conferred" (citing cases).

So also, *Lane v. Watts*, 234 U. S. 525. Appeal from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, enjoining the Secretary of the Interior and the Commissioner of the General Land Office from proceeding in the matter of certain attempted entries under the public land laws.

Mr. Justice McKenna, delivering the opinion of the Court, said:

"The title having passed by the location of the grant and the approval of it, the title could not be subsequently divested by the officers of the Land Department (*Ballinger v. United States*, 215 U. S. 240). In other words, and specifically, the action of

the Commissioner in approving the location of the grant cannot be revoked by his successor in office, and an attempt to do so can be enjoined (*Noble v. Union River Logging R. Co.*, 147 U. S. 165; *Philadelphia Co. v. Stimson*, 223 U. S. 605). The suit is one to restrain the appellants from an illegal act under color of their office which will cast a cloud upon the title of the appellees.

“This disposes of the contentions of appellants that this is a suit against the United States, or one for recovery of land merely, or that there is a defect of parties, or that the suit is an attempted direct appeal from the decision of the Interior Department, or a trial of title to land not situated within the jurisdiction of the court ‘wherein an essential party not present in the forum and is not even suable—the United States.’ ”

The majority opinions are in conflict with the case of *United States v. Lee*, 106 U. S. 196. This case is cited by the Court (R. 119), and distinguished on the ground that the property was held not to be that of the United States and the majority opinions state that the plea of immunity rested upon the facts in the case, that is, if ownership in the complainant was not proven, the plea would be denied. In so doing the Court, of course, assumed again, as a matter of law, that the vessels in controversy were the sole property of the United States and that Mr. Goltra had no rights, or property rights, in them which might be taken without due process of law.

The Lee case was an action by plaintiff against certain officers of the Government to recover land held by the Government, and devoted to public uses, as "Arlington Cemetery." In that case—as in this—the Attorney-General filed a "suggestion" that the cause was against the United States. And he "moved that the declaration in the suit be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper in the premises."

Mr. Justice Miller, in that case, wrote a powerful opinion, which has been followed as the law ever since in a large number of cases, and has never been overruled. In setting forth the fundamental principles—which are as applicable to the case at bar—he said:

"Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the Government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the Government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him, when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Chief Justice

Marshall says, to examine whether this authority is rightfully assumed, is the exercise of jurisdiction and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption, that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

“But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?”

Again he said:

“Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class.

“Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without any lawful authority, without any process of law and without any compensation, because the President has ordered it and his officers are in possession?

“If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights. * * *

“Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the Government, as is decided by this Court in the case of *Carr v. United States*, already referred to, the Government is always to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights.”

Among the many cases in which the case of *United States v. Lee*, *supra*, has been cited are the following:

- Stanley v. Schwalby*, 147 U. S. 508, l. c. 518, also 523, dissenting opinion of Field, J.;
- Belknap v. Schild*, 161 U. S. 10, l. c. 19;
- Tindal v. Wesley*, 167 U. S. 204, l. c. 213;
- Wadsworth v. Boysen*, 148 Fed. 771, l. c. 780;
- Ex parte Young*, 208 U. S. 123, l. c. 151;
- Philadelphia v. Stimson*, 223 U. S. 605, l. c. 619;
- Louisiana v. McAdoo*, 234 U. S. 627, l. c. 629;
- McComb v. U. S. Housing Corp.*, 264 Fed. 589, l. c. 592;
- Muenster v. Meredith*, 264 Fed. 243, l. c. 246;
- Walker v. Ford*, 269 Fed. 877, l. c. 178;
- The Pesaro*, 255 U. S. 216, l. c. 219;
- The Pesaro*, 277 Fed. 473, l. c. 475;

Sloan Shipyards Corp. v. U. S. Shipping Board,
258 U. S. 549, l. c. 567;

Mfrs. L. & Imp. Co. v. U. S. Board E. F. Corp.,
284 Fed. 231, l. c. 234.

The decision also conflicts with that of *Sloan Shipyards v. U. S. Fleet Corp.*, 238 U. S. 549, cited by the Court (R. 130). The question of the title to the vessels is discussed under a separate heading in this brief, but the Court differentiated the Shipyards case on the ground that it could not be assumed from "the allegations of the bill alone," that the Fleet Corporation did not have the power delegated to it by the President.

On the other hand, the Court of Appeals overlooked the allegations in the bill in the case at bar, that in this bill it is alleged that the alleged breach, mentioned in the letter of the Secretary of War, March 3, 1923 (R. 67); i. e., failure to operate as a common carrier, was not committed, but also that after Mr. Goltra had operated the vessels as such he was prevented from further so doing by the Secretary of War, who issued orders requiring Mr. Goltra to charge for carrying freight the prohibitive 100 per cent railroad rate (R. 62, Ex. 6; 64, Ex. 9; 65, Ex. 10).

In the Shipping Board cases, 258 U. S. 549, the Court, through Justice Holmes, said (after reciting the facts that the contracts were made for and in behalf of the United States—and the relief sought in equity was to restore certain property to complainants which had been

taken by defendants and to cancel contract substituted by defendant for the original contract):

“They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign, properly so called, is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man, we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be, and for the greatest ends; but the agent, because he is agent, does not cease to be answerable for his acts. * * *

“The plaintiffs are not suing the United States, but the Fleet Corporation; and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name. **It is not impossible that the Fleet Corporation purported to act under the contract giving it the right to take posses-**

sion in certain events, but that the plaintiffs can show that the events had not occurred. * * *

“We attach no importance to the fact that the second contract, alleged to have been illegally extorted, was made with the Fleet Corporation, ‘representing the United States of America.’ The Fleet Corporation was the contractor, even if the added words had any secondary effect.”

The case of United States Harness Co. v. Graham et al., 288 Fed. 929, was, in practically all respects, similar to case under consideration, and was determined upon a motion to dismiss wherein the grounds for dismissal urged were:

“It plainly appears from the bill and exhibits filed therewith that this suit is one involving substantial property rights and interests of the United States Government, and therefore while nominally a suit against the individual defendants, is, in fact, one against the United States.

“That the same is prosecuted without the consent of the United States.

“The bill is one for an injunction only and no other relief is specifically prayed for in the bill.”

In that case complainant secured a restraining order and a mandatory order to restore the property already taken.

The defendants, officers of the War Department, were operating under an order of the President of the United

States and the Secretary of War and proceeded to seize the goods by force of arms, without giving the complainant an opportunity to be heard—and seized the property before the restraining order could be issued.

The Court, in overruling said motion, said:

“Upon considering the matters thus far involved in this suit, I am confronted with Article V of the Constitution of the United States, wherein it states:

“No person shall * * * be deprived of life, liberty or property without due process of law. * * *”

And again:

“Is the citizen to be denied his right of intervention and protection from the judiciary solely because the President has signed a paper that would strike down the claimed vested legal property rights of a citizen?

“Can contracts alleged to have been legally entered into between citizens and duly authorized representatives of the Government be declared void by the President without resort to the judiciary and an opportunity being given those claiming vested rights thereunder to be heard?

“I do not think so.”

The right to enjoin officers of the state in a matter which directly affects the state and its powers was early decided by the Supreme Court of the United States in *Osborn v. The Bank of the United States*, 9 Wheat. 738.

This is a leading case, and has been frequently cited with approval and followed. The opinion was by Chief Justice Marshall and is a familiar one in the political and judicial history of the country.

In *Payne v. Central Pac. Ry. Co.*, 255 U. S. 288, Mr. Justice Van Devanter delivered the opinion of the Court, l. c. 231:

“This is a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from canceling a selection of indemnity lands under a railroad land grant. The trial court dismissed the bill and the Court of Appeals reversed that decree and directed that an injunction issue (46 App. D. C. 374). An appeal under p. 250, par. 6, of the Judicial Code brings the case here.”

After a discussion of the case (*quod vide*), the Court continues, l. c. 238:

“We are asked to say that this is a suit against the United States and therefore not maintainable without its consent, but we think the suit is one to restrain the appellants from canceling a valid indemnity selection through a mistaken conception of their authority and thereby casting a cloud on the plaintiff's title (*Ballinger v. Frost*, 216 U. S. 240; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 619-620; *Lane v. Watts*, 234 U. S. 525, 540).”

The power of the Postmaster General was checked by an injunction in *American School of Magnetic Healing v.*

McAnnulty, 187 U. S. 94. In that case, Mr. Justice Peckham applied the rule of law as follows, p. 110:

*“The Postmaster General’s order, being the result of a mistaken view of the law, could not operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto, until some action of the court. In such a case as the one before us there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. Although the Postmaster General had jurisdiction over the subject matter (assuming the validity of the acts), and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was within the statute, **yet such decision, being a legal error, does not bind the courts.**”*

Wadsworth v. Boysen, 148 Fed. 771, C. C. A., 8th Circuit, was a suit to enjoin an Indian agent from obstructing plaintiff from prospecting for the purpose of selecting mineral lands thereon. Demurrer to bill overruled. Temporary injunction granted—on appeal—affirmed.

Before Sanborn and Van Devanter, Circuit Judges, and Philips, District Judge.

The opinion, after citing authorities affecting the title to land, notably Minnesota v. Hitchcock, 185 U. S. 377, draws the distinction between cases, and cites most of the leading cases, contra, as follows:

“The case at bar falls within that class where the individual complainant seeks redress against one or more persons for an invasion of his property rights, and who pretend to be acting under a warrant of some federal statute or official, in which the complainant asserts that neither the statute nor the public law confers any such right upon the wrongdoer. As said in *Noble v. Union River Logging Railroad*, 147 U. S. 172:

“ ‘If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do.’ ”

Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72, before Sanborn and Smith, Circuit Judges, and Trieber, District Judge, was an appeal from the District Court for the District of South Dakota. The suit was by the Belle Fourche Valley Water Users' Association against Frank C. Magruder and others. From an order refusing to set aside a restraining order and granting an interlocutory injunction, defendants appeal. Opinion by Sanborn, Circuit Judge, p. 74 et seq.

“(3) Another objection to the complaint is that it evidences a cause of action against the United States. This contention is presented in numerous forms, such as that the defendants are the officers of the United States and their acts are the acts of the United States, that an injunction against their acts would constitute an interference with the use and possession of the property of the United States, the water of its reser-

voir, and would compel specific performance of its contracts.

* * * * *

If the averments of the complainants are true, and in deciding the question now under consideration they must be assumed to be so, these acts are unauthorized by and contrary to law. **They are, therefore, not the acts of the United States, or a suit to interfere with its property, or a suit to compel specific performance of its contracts."**

In closing his opinion Judge Sanborn says, p. 82:

"(6) **The controlling reason** for the existence of the right to issue an interlocutory injunction is that the Court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before these claims can be investigated and adjudicated.

"A preliminary injunction maintaining the existing situation may properly issue whenever the questions of law and fact to be ultimately determined in the suit are grave and difficult, and injury to the moving party will be certain, great, and irreparable if the motion is denied, while the loss and inconvenience to the opposing party will be inconsiderable."

The United States a Trader; Not a Government.

The majority opinions completely overlook the fact that in this transaction the United States was not acting in its sovereign capacity, nor in a governmental capacity. It

was engaged in a commercial enterprise, not only here, but in connection with the Mississippi-Warrior Service, and it was insisting that Mr. Goltra should not compete with that enterprise. In discussing rates the Secretary of War wrote Mr. Goltra, March 31, 1922 (R. 62, Ex. 6):

“But in any case I told you at the time I could not authorize or approve any operation on the lower Mississippi that would enter into competition with the established line of barges. This line is operated for a definite purpose and should not be interfered with in the operation by any action of the Government.”

And again he wrote May 25, 1922 (R. 65, Ex. 10):

“The officials of the Inland and Coastwise Waterways Service, and the Mississippi Section, have been instructed to co-operate with you to the fullest extent in making the operation of your fleet a success; the only limitation being that you shall not engage in such competition with them as to stifle the success of the Mississippi-River Service.”

On this subject Judge Sanborn said, in his dissenting opinion (R. 137):

“Again, the lease and contract of sale and the rights of all parties in interest thereunder arose from and evidence business or commercial transactions. In none of them was or is the United States acting as a sovereign in governing the Nation or the people of the Nation. The entire transaction and any interest

it may have in it and the property involved as against the plaintiff is a commercial and business and not a governmental matter. As against him it stands in the relation of a private party divested of its privileges and immunities as a sovereign and, hence, of its privilege of exemption from suit against the party it made the lessor in this contract and amenable to the suits to enforce it (*United States v. Planters Bank of Georgia*, 9 Wheaton 904).''

In the case of *South Carolina v. United States*, 199 U. S. 43, Mr. Justice Brewer makes some pertinent contrasts—applicable to the case at bar—between the exercise of governmental functions and functions of a private nature in which the state, the government, engages as a business.

To like effect is the language of Chief Justice Marshall in *Bank of U. S. v. Planters Bank of Georgia*, 9 Wheat. 904, where he said:

“ ‘It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.’ ”

These words are quoted and followed in many cases,
e. g.:

Bank of Kentucky v. Wister, 2 Pet. 318;
Briscoe v. Bank of Ky., 11 Peters 256, 323;
Louisville R. R. v. Letson, 2 How. 304, 308;
Panama R. R. v. Curran, 256 Fed. 772 (C. C. A.);
Lord & Burnham v. U. S. S. B. E. F. C. (D. C.),
256 Fed. 957;
The Pesaro, 277 Fed. 473 (D. C.).

To these adjudicated cases, add the language, in the same spirit, in the statute; that is to say: The operation of the transportation facilities is to be "in the same manner and to the same extent as if such transportation facilities were privately owned and operated."

Sec. 201 (e) of the Transportation Act of 1920 is as follows:

"(e) The operation of the transportation facilities referred to in this section shall be subject to the provisions of the Interstate Commerce Act as amended by this Act or by subsequent legislation, and to the provisions of the 'Shipping Act, 1916,' as now or hereafter amended, **in the same manner and to the same extent as if such transportation facilities were privately owned and operated; and all such vessels while operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels, whether the United States is interested therein as owner, in whole or in part, or holds any mortgage, lien, or interest therein.**"

Whether the contracts are or are not to be considered for all purposes as contracts with the United States, the fact remains that the subject matter of said contracts related to the carrying on of a private business venture for a profit, in which the United States was a "partner," within the meaning of Chief Justice Marshall in the case of *Bank of U. S. v. Planters Bank of Ga.*, 9 Wheat. 904, and the numerous cases which followed it, and are cited elsewhere in this brief.

If the defendants combined together, and threatened to take away by force from the plaintiff the only property with which that partnership could be carried forward, etc., injunction is the only remedy.

We print in the Addenda the opinion rendered by the Honorable Charles B. Faris, Judge of the District Court, on the motion of the Government and of the defendants, to dismiss the cause on the ground that it was a suit against the Government. This opinion was rendered after the motion had been fully argued and briefed. We are submitting it not only because it fully answers the argument of the respondents, but also because it shows the Court's theory on which the point was decided. The opinion of the District Court in the granting of the temporary injunction is printed in the record (R. 45).

POINT VI.

Due Process of the Law.

The arbitrary seizure to deprive the petitioner herein of his property without due process of law, as guaranteed to him under the Fifth Amendment of the Constitution of the United States, is in violation thereof.

Not only did the acts of these respondents deprive this petitioner of his property without due process of law, as guaranteed to him under the Fifth Amendment of the Constitution of the United States, but their acts clearly demonstrate that they were intentionally evading process of the courts of this land and undertook to demonstrate that they were mightier than the courts.

The contract of lease and option to purchase clearly demonstrates that the petitioner herein entered into said contract for a good and valuable consideration as set forth therein, viz., that the petitioner agreed to and did release certain good and valuable claims which he maintained, as a result of entering into certain contracts and commitments in furtherance of providing munitions of war during the conflict with the Imperial Government of Germany.

Furthermore, the contract itself and the evidence adduced at the hearing conclusively show that the petitioner expended large sums of money in the matter of contracting for cargoes of oil, coal, manganese and other commodities subsequent to entering into the contract in ques-

tion and prior to the delivery of the boats and barges in anticipation of said delivery (R. 64). In taking over the fleet on or about July 15, 1922, the petitioner herein expended further large sums of money in purchasing the necessary amount of insurance and a bond in the sum of \$200,000.00, as provided for in said contract; and under the supplemental contract, May 26, 1921, the petitioner further expended sums of money for additional insurance and for the purchase of land upon which the unloading facilities were erected (R. 57).

At this point, we again call attention to the fact that when the boats and barges and the unloading facilities were turned over and delivered to the petitioner herein the contract of lease became an executed contract.

At the time of the delivery of the fleet and the unloading facilities, under the terms of the contract of lease and option to purchase and the supplemental contract, the petitioner herein became vested with definite property rights and title to the property as provided for in the contracts, some of which are directed to the Court's attention, as follows:

Under the terms of the contract of lease, the petitioner was vested with the property rights of possession, control and operation, as a lessee, for a definite and fixed term of five years, beginning with the date of delivery to the petitioner of the boats and barges (R. 5), and was also vested with the definite equitable title to the fleet and the unloading facilities under the definite terms of his option to purchase the entire equipment (R. 58).

The petitioner also expended large sums of money after the equipment was turned over and delivered to him for the purpose of making tests, alterations and changes in the equipment so as to make the boats and barges adaptable for transportation on the Mississippi River (R. 71), and for the purpose of building up an organization and securing contracts for transportation under the terms of said contract.

The facts and circumstances fully disclose and demonstrate that the real party or parties in interest in depriving the petitioner of his property without due process of law was not the Government of the United States in its sovereign and governmental capacity, but was Col. T. Q. Ashburn, the competitive barge line engaged in transportation of commodities on the Mississippi River as a common carrier known as the Mississippi-Warrior Service, the officials thereof, being civilians engaged in a commercial enterprise, and the private interests or private persons who ultimately expected to become the owner of all of the transportation facilities on the Mississippi River. The Mississippi-Warrior Service was operated by the Inland Waterways and Coastwise Service, of which Col. T. Q. Ashburn was the Chief. These were later succeeded by the Inland Waterways Corporation, created under the Act of June 3, 1924 (Fed. Stat. Ann. Supp. 1924, p. 185), which act provided for a civilian or an officer to be designated by the Secretary of War to become the Chairman of the Board and the executive head. Col.

T. Q. Ashburn was designated by the Secretary of War and appointed to the position of Chairman of the Board and the executive head of the Inland Waterways Corporation, which has taken over all of said transportation systems on the Mississippi River. This Act of Congress recognizes this as a commercial institution and provides for said corporation to sue and to be sued the same as a private corporation.

It will be remembered that the United States District Attorney at St. Louis informed the petitioner herein that the boats and barges in question were to be delivered to the Mississippi-Warrior Service, and that within about two years the Mississippi-Warrior Service expected to have these boats and barges turned over to private interests and to private persons (R. 81, 82).

Mr. C. E. Patton, Superintendent of the Mississippi-Warrior Service, who participated in the seizure, stated that these boats and barges were needed by the Mississippi-Warrior Service (R. 98). The actual seizure was made by Col. Ashburn, Chief of Inland Waterways and Coastwise Service with the equipment, officers and men of the Mississippi-Warrior Service.

There is nothing in the record to show that the Government in its sovereign or governmental capacity had need for these boats and barges, nor is there anything in the record to show that the Government in its sovereign or governmental capacity attempted to deprive the petitioner herein of his property, without due process of law. The

record does disclose that the Secretary of War and the Assistant Secretary of War signed certain orders, probably in a perfunctory manner at the specific instigation and request of Col. T. Q. Ashburn, Chief, Inland Waterways and Coastwise Service.

The Secretary of War fully realized his limitations in depriving the petitioner herein of his property rights without due process of law at the time he signed the order of March 3, 1923, declaring the said contract terminated, because at the same time he gave specific written directions to Col. T. Q. Ashburn to the effect: "in the event of his failure or refusal to make delivery of the property demanded, you will apply to the United States District Attorney at St. Louis, requesting the institution of legal proceedings for the recovery of said property" (R. 68).

On March 25, 1923, the petitioner herein was in absolute possession and control of all of the towboats, barges and unloading facilities with vested property rights therein as above disclosed.

On Sunday, March 25, 1923, between the hours of 8 and 9 o'clock, in the forenoon, without notice or warning to the petitioner or any of his representatives, Col. T. Q. Ashburn, through absolute secrecy, came to St. Louis, after having directed the officers of the Mississippi-Warrior Service to meet him in St. Louis so as to aid and assist him in arbitrarily seizing the boats and barges then in the possession and control of the petitioner herein, for the purpose of making the unlawful seizure.

The facts disclose that Col. Ashburn selected Sunday as the day for the seizure because he wanted secrecy and wanted to seize the boats and barges without interference on the part of the petitioner herein, and without any interference on the part of the United States District Court.

Not only did Col. Ashburn proceed to take physical possession of the property of the petitioner herein by means of threats, coercion, display or firearms and with a large force of men, but he hoped to deprive the petitioner of his property without the interference of the courts to which, he knew, the petitioner would go for redress. The facts disclose that it was impossible for the respondents to seize all of the equipment at one time and that it required several trips before possession was taken of all of the boats and barges. They labored until 10 o'clock Sunday night. They seized the boats and barges at St. Louis on the Missouri shore side, but immediately moved them to a point some distance south of St. Louis on the Illinois shore side for the specific purpose of attempting to evade the anticipated process of the United States District Court for the Eastern District of Missouri. The facts further disclose that on this Sunday, when business houses were closed, professional men were not at their offices, and when it was difficult to secure an order of the Court and to have the same served, the petitioner herein did, in view of all of these adverse conditions, have his counsel prepare a bill praying for a restraining order. This bill was hurriedly prepared on Sunday afternoon and an order of the Court

secured restraining the defendants from proceeding with the seizure and requiring, by a mandatory order, to return such equipment as the defendants had already seized. Col. Ashburn was notified Sunday afternoon that the petitioner herein was applying for a restraining order. He ignored this information and request to discontinue until the Court had an opportunity to have the order served upon him. The order of Court was served upon Col. Ashburn on Monday, March 26, but Col. Ashburn continued the seizure. He undertook to refuse to acknowledge service of the order. He was again served while he was moving the equipment south on the Mississippi River on Tuesday, March 27, before he had completed the seizure. He not only refused to acknowledge service of the order on this occasion, but undertook to prevent the United States Marshal from serving him. Although having been served twice with the order of the United States District Court restraining him from proceeding with the seizure, Col. Ashburn continued with the boats and barges to Fayville, where he seized three or four additional barges belonging to this fleet late Tuesday afternoon, March 27th. Col. Ashburn then proceeded on down the river to the Ohio River for the purpose of taking the boats and barges entirely out of the jurisdiction of the United States District Court for the Eastern District of Missouri with the specific intention and purpose of depriving the United States District Court of its jurisdiction (R. 95).

Although the order of the United States District Court directed him to return all of the boats and barges to St.

Louis, where he had seized them, these respondents herein filed motions in the United States District Court for the Eastern District of Missouri attacking the service and jurisdiction of this Court and in the meantime retained possession of the boats and barges. The boats and barges were retained in the possession of Col. Ashburn until about July 25, 1923, when they were returned under order of Court to the port at St. Louis. In the meantime, the Attorney-General of the United States, representing the United States, filed a motion in the Supreme Court of the United States praying for a writ of prohibition against the Judge of the United States District Court for the Eastern District of Missouri, and in pursuance to the filing of this motion in the Supreme Court of the United States, an ex parte petition was presented, in vacation, to the United States Supreme Court, praying for an order of that Court for the delivery of said boats and barges to Col. T. Q. Ashburn pending the action of the United States Supreme Court on the aforesaid motion for a writ of prohibition. Thereupon, Col. Ashburn and the Mississippi-Warrior Service again took possession of the boats and barges and thereafter retained possession until the United States District Court for the Eastern District of Missouri threatened the respondents with contempt proceedings, July 7, 1924. unless the respondents returned said boats and barges to the Court of St. Louis on or before July 11, 1924.

These facts are called to the Court's attention for the purpose of showing that the respondents not only deprived

the petitioner herein of his property without due process of law as guaranteed to him under the Fifth Amendment of the Constitution of the United States, but that the respondents acted in defiance of the petitioner's property rights and in defiance of the courts of our country.

In concluding our argument on this point, we quote the following paragraph from Judge Sanborn's opinion in this case (R. 139):

“The Fifth Amendment of the Constitution of the United States states: ‘No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.’ This provision of the Constitution forbids citizens, officers, courts, and the United States itself, from depriving any person of his property without due process. Notwithstanding the provision in the lease and contract that William M. Black, the lessor, on noncompliance, in his judgment, by the plaintiff with any of the terms of the lease and contract would be justified in terminating the lease and returning the property to the lessor, the writer is unable to bring his mind to the conclusion that the acts of the defendants in this case, the notice of Honorable John W. Weeks, Secretary of War, of March 3, 1923, that, in his judgment, the plaintiff had not complied with the terms of the lease and contract and his peremptory demand that the plaintiff surrender the property, his failure to give notice of or an opportunity for a hearing before him by the plaintiff on the question of the latter's compliance with the terms of the contract, either before or after the plaintiff by his answer to the Secretary's letter of March 3, 1923, requested such

an opportunity and hearing by his letter of March 8, 1923, the sudden, coercing seizure and taking from the plaintiff of much of this property on Sunday and the attempt to run it beyond the jurisdiction of the court below, constituted due process of law. To the writer they look more like an attempt to avoid or evade due process of law."

POINT VII.

Section 8 of the Contract of Lease and Option to Purchase Does Not Warrant the Forfeiture Power Claimed.

Section eight (8) of the contract of lease and option to purchase does not warrant the construction contended by the respondents and the construction placed thereon by the majority opinions of the court below to the effect that it is a forfeiture provision granting to the Secretary of War, who is not designated therein for such purposes, the power to terminate said contract for failure to operate as a common carrier, at his discretion or in his judgment, in an unwarranted, unlawful, and arbitrary manner, and the further power then to seize the fleet through an agency engaged in a competitive commercial enterprise for the purpose of depriving one citizen of his property to deliver the same over to a group of other citizens engaged in commerce and trade.

The above being true, the respondents must fail here and the Court below must be reversed on its conclusion as expressed in the majority opinions:

“While it may be conceded had the lease contained no provision for re-entry and retaking possession of the property, resort must have been had to some judicial tribunal in such case to ascertain and determine if conditions of the lease had been so broken as to terminate the lease” (R. 121).

The section under consideration reads as follows:

“8. The lessor reserves the right to inspect the plant, fleet and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employes are promptly paid, monthly or oftener; and noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the treasury or in the bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels” (R. 9).

Since it is contended that the Secretary of War exercised his discretionary power under the foregoing section, based upon the petitioner's alleged failure to operate said fleet as a common carrier as provided under section two (2), paragraph (a), this section shall be considered in connection with the former. Section 2 (a) provides.

“That the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any re-

newals thereof, transporting iron ore, coal, and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made provided the Secretary of War consents to such use other than as a common carrier" (R. 5).

It will be noted that no discretion, power or authority, whatsoever, is given to the Secretary of War in section eight, but on the contrary whatever discretion, power or authority is granted therein is given to the lessor. No power or authority is granted the lessor under section 2 (a) but the matter of authorizing rates so as to enable the lessee to operate as a common carrier is left expressly to the Secretary of War.

An elementary principle of law is that forfeitures are not favored, in law, and one who seeks to enforce forfeiture must clearly establish his right to do so.

Phil. W. & B. R. Co. v. Howard, 13 How. 307;
Hartman v. C. B. & Q. R. Co., 182 S. W. 148.

This principle is concisely set forth in 6 Ruling Case Law, sec. 291, page 906, as follows:

"Before forfeiture can occur, there must be no question but that the parties intended to provide for it in the contract under which it is attempted to be enforced and when the contract is revocable at the

pleasure of either party, without condition expressed, a penalty of forfeiture cannot be enforced against either party making the revocation.

“Forfeitures are enforced only where there is the clearest evidence that that was what was meant by the stipulation of the parties.

“Nothing but the clearest expression of such a design would justify the assumption that an executed contract was intended by either party as a snare. If technical forfeiture could be sustained by such intendment, the effect would be to weaken private confidence in commercial faith, and occasion just solicitude as to the security of important rights.”

Furthermore courts will not sanction the cancellation or termination of a contract by one party thereto by arbitrary decision or action even though the contract authorizes him terminating the contract.

The *Anvil Mining Co. v. Humble*, 153 U. S. 540. Justice Storey more clearly expresses this principle in 3 Story's *Equity Jurisprudence* (14th Ed. 1918), Chap. XXXVII, Sections 1728 and 1741, as follows:

“In reason, in conscience, in natural equity, there is no ground to say because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that if he omits to do the act he shall suffer an enormous loss wholly disproportionate to the injury to the other party. If it be said that it is his own folly to have made such a stipulation, it may equally well be said that the folly of one man

cannot authorize gross oppression on the other side. And law as a science would be unworthy of the name if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side, and of skill, avarice, cunning and a gross violation of the principles of morals and conscience on the other. There are many cases in which Courts of Equity interfere upon mixed grounds of this sort. There is no more intrinsic sanctity in stipulations by contract than in other solemn acts of parties which are constantly interfered with by Courts of Equity upon the broad ground of public policy or the pure principles of natural justice. Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose as it would be to allow him to substitute another for the principal obligation. The whole system of Equity Jurisprudence proceeds upon the ground that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice or fraud or oppression, or harsh and vindictive injury."

"Sec. 1741 (Forfeiture Produced by Defendant Will Not Be Allowed to Prevail Against Rights of Complainant).—The policy of Courts of Equity is against the enforcement of conditions that would lead to the decree of a forfeiture, and where one seeks to bring himself within the reason and spirit of the rule, and enforce the instrument in terms, it is usually where the complainant is entitled to the condition or object sought, as a matter of law, although it be in terms a forfeiture or penalty. If in the deal-

ing between the parties, one has overreached the other, as if fraud, accident, or a mistake has been induced or if the defendant has purposely and intentionally brought such conditions and influence to bear upon the complainant, that he has been compelled to abandon his interest in the contract or property, or fail to properly perform his covenants, so that, strictly speaking, a forfeiture has occurred, a Court of Equity will intervene and prevent the enforcement of the forfeiture. It is a salutary rule of law that one who prevents the performance of a condition, or makes it impossible by his own act will not be permitted to take advantage of the nonperformance. * * * A Court of Equity looks at the substance rather than the form, and it will not permit an injustice of this sort to be effected, so that the contract cannot be fulfilled to the letter, and then decree a forfeiture.”

Especially is it true where the party who seeks to enforce forfeiture is guilty of such acts which prevented the other party from complying with the terms of his contract.

United States v. U. S. Engineering & C. Co., 234
U. S. 236;

District of Columbia v. Cambden Iron Works, 181
U. S. 455;

Cheney v. Libby, 134 U. S. 69;

United States v. Peck, 102 U. S. 64.

In the light of these well-established principles let us

examine the contracts, the essential parts of which have heretofore been set out.

1. Who is the lessor designated in the contracts and with whom petitioner contracted?

The contract reads: "between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor."

Said contract is merely signed on behalf of lessor: "William M. Black, Major General, Chief of Engineers, U. S. Army (First Party)."

The alteration clause at the end of said contract reads: "It is further understood and agreed between the said William M. Black, Chief of Engineers, United States Army * * * party of the first part."

The supplemental contract, referring to the above, reads as follows:

"Whereas, on the twenty-eighth day of May, 1919, a contract was entered into between Major General W. M. Black, Chief of Engineers, U. S. Army, who, as well as his legally appointed successor, is hereinafter designated as the lessor representing the United States of America."

Having the same question in mind, the Court, in the case of Sloan Shipyards Corp. v. United States Shipping

Board etc., 258 U. S. 549, through Mr. Justice Holmes, said:

“This contract was made on February 1, 1919, when the character of the Fleet Corporation had been more fully developed and determined than in the previous case, and purported to be made with the Fleet Corporation—a corporation organized and existing, etc. (hereinafter called the ‘Corporation’), representing the United States of America, party of the second part. Throughout the contract the undertakings of the party of the second part are expressed to be the undertakings of the Corporation, and it is this Corporation and its officers that are to be satisfied in regard to what is required from the Iron Works. * * *

“The whole frame of the instrument seems to us plainly to recognize the corporation as the immediate party to the contract.”

United States District Judge Baker, in the case of United States Harness Co. v. Graham et al., 288 Fed. 929, took the same view in the matter of a **“contract with the Government of the United States of America**, acting by and through E. C. Morse, Director of Sales, Supply Division, General Staff.”

As in the Shipping Board case (*supra*), so in this case—the Chief of Engineers is the lessor and is plainly recognized as the immediate party to the contract. By the very terms of designation of parties he is so recognized, and by their own interpretation of the clause to the contract and in the supplemental contract he is so designated.

As in the Shipping Board case, so in this case, "Throughout the contract the undertakings" of the first party are expressed as the undertakings of the lessor (Chief of Engineers) with the exceptions of certain specific things therein are to be subject to the approval of the Secretary of War.

The Secretary of War is not a party to this contract, but is designated therein for certain specific purposes only, namely:

(a) The money expended for the construction of the fleet was not appropriated to the Secretary of War, but to the United States Shipping Board Emergency Fleet Corporation—and was not allotted to the Secretary of War, but allotted to the Chief of Engineers.

(b) The Secretary of War, under section 2 (a) must consent to rates to be charged if less than prevailing rail tariffs—and may consent to the use of said fleet other than as a common carrier.

(c) The Secretary of War shall determine the amount of insurance, but the approval of the companies is left to the lessor.

(d) Net earnings shall be turned over to the Secretary of War—who shall create a special deposit with the Treasurer of the United States.

(e) In the event of lessor and lessee being unable to agree upon overhead expenses, same shall be referred to the Secretary of War, whose decision shall be final.

(f) Under clause 7, relative to the option, the Secre-

tary of War may appoint the third member of a board of appraisers.

(g) Under paragraph 7 (b) the Secretary of War may retain certain deposits in the event of purchase under the option.

With exception to these specific provisions the Secretary of War is not mentioned therein and has absolutely no other authority, powers or duties.

Col. T. Q. Ashburn, Chief Inland and Coastwise Waterways Service—and the Mississippi-Warrior Service are in no way parties to said contract—are in no way mentioned therein—and in no way are they or either of them given authority, powers or duties.

In all respects, except the foregoing, the Chief of Engineers, designated as the lessor, is the only and real party given the authority and powers and charged with the duties of seeing that all covenants are carried out in said contract.

Now, then, what is paragraph 8, which is relied upon by the defendants as a forfeiture clause?

By the interpretation placed upon this paragraph 8 by the lessor himself in the supplemental contract it is exactly what the parties to the contract intended it to be, viz., "Inspection (paragraph 8)"—Sec. 8 provides that the lessor (the Chief of Engineers) reserves the right to inspect the plant, fleet and work, at any time, to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employes are promptly

paid monthly or oftener; and noncompliance, in his (Chief of Engineers) judgment, with any of the terms or conditions will justify his (Chief of Engineers) terminating the lease and returning (who could return the property other than the party in possession—the lessee?) the plant and said barges and towboats to the lessor (Chief of Engineers), and all moneys in the Treasury or in the bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels.

Clearly paragraph 8 is an inspection provision reserved to the Chief of Engineers for certain specific things and upon inspection the Chief of Engineers might cancel said contract, but only for a failure to comply with the specific things mentioned, for a forfeiture clause cannot be enlarged or added to.

The paragraph has nothing to do with the covenant about operation of said fleet as a common carrier.

The Chief of Engineers had found no breach of the covenants or conditions referred to in said paragraph.

The Chief of Engineers (the lessor) had made no effort or attempt to declare a cancellation.

The Secretary of War has no express or implied authority, powers or duties under this paragraph.

The Chief of Inland and Coastwise Waterways Service, the Mississippi River-Warrior Service and Col. T. Q. Ashburn have no authority, powers or duties under same.

The only party named or designated therein, who has

any power or authority to receive said property, is the lessor (Chief of Engineers).

Neither the Secretary of War, nor Col. T. Q. Ashburn, nor the Mississippi River-Warrior Service, has any right, power or authority to receive, take or hold said property.

Certainly there can be no interpretation of said paragraph which, by implication or otherwise, would warrant even the lessor (Chief of Engineers) to seize said property by force of arms.

This was fully realized by the Secretary of War at the time he prepared his notice to petitioner under date of March 3, 1923, for, in his instructions to Col. T. Q. Ashburn, same date, he directed Col. Ashburn as follows:

“In the event of his failure or refusal to make delivery of the property demanded you will apply to the United States District Attorney at St. Louis requesting the institution of legal proceedings for the said property.”

Even though said paragraph 8 could be added to and enlarged, as defendants would have it (and which petitioner emphatically denies) so as to interpret the same with a view of empowering the Secretary of War to exercise such arbitrary powers under right of forfeiture, still the facts are such that the Secretary could not have declared a forfeiture upon the grounds of breach of covenant 2 (a) which pertains to the operation of said fleet as a carrier, especially without an opportunity on the part of petitioner to be heard.

In the first place, covenant 2 (a) has no provision relative to cancellation or forfeiture.

Said covenant is so ambiguous and uncertain as to make it impossible of explicit interpretation, especially in view of the interpretation placed upon said covenant, from time to time, by the parties and the Secretary of War.

The facts clearly show that complainant fully complied with said covenant in so far as he was able in view of the facts and circumstances as shown and that further compliance therewith was prevented and prohibited by the Secretary of War.

As is said in 3 Story's Equity Jurisprudence (Supra):

“If in the dealings between the parties, one has overreached the other, as if fraud, accident or a mistake has been induced, or if the defendant has purposely and intentionally brought such conditions and influence to bear upon the complainant, that he has been compelled to abandon his interest in the contract or property or fail to properly perform his covenants, so that, strictly speaking, a forfeiture has occurred, a court of equity will intervene and prevent the enforcement of the forfeiture.”

Time Is Not of the Essence of This Contract.

It is obvious, at the time the contract was entered into, the parties could not determine a time when the fleet should be put into operation as a common carrier, and it was not the intention of the parties to make time of the

essence of the contract. The circumstances clearly show that it was impossible to determine when these boats and barges could be put into operation. The contract for the construction of towboats was entered into August 1, 1918 (R. 5). They were still under construction at the time the contract in question was entered into, May 28th, 1919 (R. 4). At the time of the execution of this contract it was uncertain whether three or four towboats were to be built (R. 10). Later, May 26th, 1921, it was determined that certain unloading facilities were necessary to carry on successful operations (R. 13). These were specially designed towboats and barges for towing coal, iron and iron ore on the Mississippi River, and it is apparent that neither the lessor nor the lessee could determine whether these specially designed boats and barges could be successfully operated on the Mississippi River. It is obvious that both parties knew that it would require some time to make experimental tests after the fleet had been completed and delivered to the lessee and contemplated certain changes and alterations. They also knew that a large fleet of four towboats and nineteen barges could not be profitably operated without establishing an organization to solicit freight. The parties also took into consideration the competition to be encountered with the established rail carriers and knew that the shipping public would not ship by barges at the same rate charged by the rail carrier. This is quite obvious because section 2 (a) provided for this, and realizing the inability of the par-

ties at that time, left the matter of determining and fixing the rate to be charged as a common carrier to the Secretary of War.

In view of these uncertainties no time was fixed or specified as to when these boats and barges were to be put into operation, nor were any specific rates provided for. Since no time was specified in section 2 (a), nor in any other clause of the contract, the parties contemplated that the fleet would be put into operation within a reasonable length of time after delivery of possession, and the question of reasonableness would be determined by the circumstances and conditions.

In addition to the above-mentioned circumstances and conditions, it must be remembered that subsequent to the execution of the contract of lease and option to purchase, May 28, 1919, the Government, through the Secretary of War, had entered the field and was engaged in the trade of transporting as a common carrier on the Mississippi River and its tributaries under the style of the Mississippi-Warrior Barge Service. This added further competition. The Secretary of War refused to permit the Goltra barges to enter into competition with the Mississippi-Warrior Service by denying to him the rates which would enable him to secure cargoes for his large and expensive equipment.

The boats and barges in question were not delivered to Mr. Goltra until July 15, 1922. Tests had to be made subsequent to the date of delivery. These tests and experi-

ments demonstrated that important and expensive changes had to be made. The towboats had to be converted from coal to oil burners. One of the towboats, the *Illinois*, was so converted.

Although restricted and prevented by the Secretary of War, these boats and barges were put into operation by Mr. Goltra, as soon as possible, and did succeed in contracting for two cargoes, one from a point on the Ohio River in Kentucky and the other from Hannibal, Missouri. It would be difficult to estimate how great the operations would have been, had the Secretary of War authorized rates so as to have permitted operation. It is obvious that the Secretary of War and the officers of the Mississippi-Warrior Service realized that the Goltra barges would have taken most of the grain and other commodities or at least a good portion. The navigation season ended December 15th, 1922, and the boats and barges were docked for winter. Goltra had possession from July 15th to December 15th, only five months before the navigation season ended. Navigation was not resumed on the Mississippi River until about the first of March, 1923. Before the Goltra fleet could be engaged in transportation at the opening of the navigation season about the first of March, 1923, he was served with notice of cancellation of his contract, March 4th, 1923, while he was in Washington, D. C.

Is it reasonable to hold that Mr. Goltra was given even a reasonable opportunity to put the fleet into operation,

reasonable time to do so, in view of the foregoing facts and circumstances?

In answer to the foregoing question, the Court will not only take into consideration the facts and circumstances *hereinabove set forth, but may also refer to page 144 of the record wherein it is clearly demonstrated that if and when the petitioner herein was given a fair and reasonable opportunity to operate the barges and boats, he could and did operate the same.* In the hearing before the United States District Court in September, 1924, when the Court ordered and directed the boats and barges to be turned over and delivered to the petitioner herein, the Court by its order made it possible for the petitioner herein to operate the same, in contrast to the failure to permit the petitioner to operate the boats and barges for the short period of time that they were in his possession from July 22, 1922, to March 3, 1923, including the non-navigable period during the winter months, by the Secretary of War.

Other Authorities Cited by the Court of Appeals.

Throughout the majority opinions the rights of the petitioner are overlooked. These opinions are based upon what the Court considers is the ultimate ownership of the boats and barges in the United States Government. It is forgotten that Mr. Goltra came into possession of these vessels through a legal contract, and that his original right to the possession is not to be questioned. It is also forgotten that through this contract Mr. Goltra has

the right himself to become the ultimate owner of the vessels, of which right he was deprived by the seizure. It is said that Mr. Goltra breached the lease, and said breach gave the Secretary of War the right to determine whether or not he had forfeited this right. The petitioner denies any breach, but very specifically denies the right of the Secretary of War to sit as a court and determine this judicial question. The petitioner contends that the defendants unlawfully interfered with his right of possession, not only by seizing the property with force of arms and thus depriving him of it, but also in adjudging a judicial question. The right of Mr. Goltra to have the courts determine the judicial question was recognized by the Secretary of War in his memorandum for Col. Ashburn (R. 67, 68, Plaintiff's Exhibit No. 12), wherein he instructed Col. Ashburn to apply to the United States District Attorney of St. Louis requesting the institution of legal proceedings for recovery of the property.

Now that Mr. Goltra seeks the interposition of a court of equity to protect his rights, and to prevent being unlawfully deprived of them, the defendants plead that they are the United States Government which is sued and this position is erroneously sustained by the majority opinions.

The elementary principle that a sovereignty cannot be sued without its consent is, of course, conceded, but the majority opinions fail to distinguish between the cases which hold that a sovereignty cannot be deprived of its property in a suit, or sued without its consent, and those

cases we have cited holding that a suit may be maintained against a government officer when he is proceeding unlawfully. As was said in Judge Faris' first opinion refusing to dismiss this case (Addenda, this brief, p. 105):

“Numerous cases, some of which are relied on by counsel for defendants as on all fours with the case at bar, are called to my attention. Generally these cases are of the type of *Wells v. Roper*, 246 U. S. 355; *Oregon v. Hitchcock*, 202 U. S. 60; *Naganab v. Hitchcock*, 202 U. S. 473; *Stanley v. Schwalby*, 162 U. S. 255; *Louisiana v. Garfield*, 211 U. S. 70; *Louisiana v. McAdoo*, 234 U. S. 627; all of which were cases dealing with rights, property and attributes of the United States accruing to it in its strict capacity as a sovereign. These cases dealt with lands, or titles thereto. held by the United States under allodial tenure as a sovereign, with vessels (vide, *The Siren*, 7 Wall. 152) captured by it in war, with import duties levied pursuant to constitutional grant of power, with matters pertaining to post offices and post roads, and others of a similar sort had, done and transacted by the United States pursuant to constitutional grant of power in its strict governmental capacity as a sovereign.”

And by the United States Court of Appeals (Eighth Circuit), in *Wadsworth v. Boysen*, 148 Fed. 771:

“The case at bar falls within that class where the individual complainant seeks redress against one or more persons for an invasion of his property rights, and who pretend to be acting under a warrant of

some federal statute or official, in which the complainant asserts that neither the statute nor the public law confers any such right upon the wrongdoer. As said in *Noble v. Union River Logging Railroad*, 147 U. S. 172:

“‘If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do.’”

A brief mention of the other authorities cited in the majority opinions will show that we are correct in our analysis of them. Those authorities are as follows:

Marbury v. Madison, 1 Cranch. 137, the famous decision by Chief Justice Marshall, was an action for a writ of mandamus, an original proceeding in the Supreme Court to compel the Secretary of State to issue a commission. It was held that mandamus was the proper remedy, but the writ was refused on the ground the Supreme Court did not have original jurisdiction, and it is interesting to quote the following paragraph from the decision (l. c. 163):

“‘The Government of the United States has been emphatically termed a government of laws and not of men. It will cease to deserve this high appellation if the laws furnish no remedy for the violation of the vested legal rights.’”

Marquez v. Frisbe, 101 U. S. 473. This case involves title to land which was in the United States, and it

was there held that the courts would not interfere with officials of the Government while in the discharge of their duties in disposing of public lands. The Court also said:

“After the United States has parted with its title, and the individual has become vested with it, the equities on which he holds it may be enforced.”

So in the case at bar, even if the United States originally held title to the vessels, it had parted at least with the equitable title to them.

Gaines v. Thompson, 7 Wall. 347. Title to land in the United States. Suit to enjoin the Commissioner of the Land Office from canceling an entry.

U. S. v. Black, 128 U. S. 40; *U. S. v. Windom*, 137 U. S. 636; *Decatur v. Paulding*, 14 Pet. 497, and *Dakota Telephone Co. v. Dakota*, 250 U. S. 184, all involve proceedings against officers of the Government, who by the law had power to exercise their discretion and, therefore, with this discretion the courts refused to interfere, but in *U. S. v. Windom*, *supra*, one of the grounds for refusing the writ of mandamus was that the relator had other remedies.

United States ex rel. Oil Co. v. Hitchcock, 190 U. S. 316. Title to land in the United States. Suit in mandamus to compel issuance of letters patent.

Minnesota v. Hitchcock, 185 U. S. 373. Suit to restrain Secretary of the Interior from selling land, title to which was in the United States, and to divest that title.

Stanley v. Schwalby, 162 U. S. 255. Suit in trespass to try title to land, the record title which was in the United States.

In re Ayers, 123 U. S. 443. Suit to restrain the Attorney-General of Virginia from instituting suit to collect taxes.

Clearly none of these cases are applicable to the case at bar and with some of them the majority opinions are in conflict.

CONCLUSION.

The attitude of the three officers of the Government is rather inconsistent. The Constitution is supreme law of the land and the Government expects and exacts the most scrupulous respect for it under severe penalties. Here we have an army officer, Col. T. Q. Ashburn, directly violating his orders, committing a trespass and depriving a citizen, who has contracted in good faith with Government officials, of his property and rights, this in direct violation of the Constitution.

Col. Ashburn's orders were, in the event Mr. Goltra declined to surrender the towboats and barges, to "apply to the United States District Attorney at St. Louis requesting the institution of legal proceedings for the recovery of said property." Up to this point some regard seems to have been had for law by the Government officials, but that disappeared when the army officer, accompanied by a large force of men, took violent and forcible posses-

sion of the property, depriving the complainant of his day in court and of his property without due process of law.

If the officials of the United States Government demand respect for the law and require obedience, how can they expect such when they themselves have no respect for it? It is a dangerous thing for this Government to decide matters of private right with an army colonel and a force of men. (See Judge Faris' opinion, R. 48, 49.)

Confessedly the defendants had guilty knowledge of the illegality of the act of seizure, else they would not have selected Sunday for it, a day when it might be thought impossible for the Court to act. Now they contend, and the majority opinions hold, that this is a suit against the United States. These opinions have the effect of making the original wrongful act of Col. Ashburn and the other defendants successful and of holding that the army of the United States, and not the courts, shall decide the rights of property of citizens in time of peace, a thing we feel sure this Honorable Court will refuse to do.

One thought more. Should the Government officials be successful in this proceeding what faith can our citizens have in Government contracts in the future? Will any citizen rely upon written promises of the United States Government if they can be violated by its army without a moment's notice?

If there ever was a case which required a court of equity to act to prevent such usurpation of authority of which these defendants have been guilty, this is one. The acts of Secretary Weeks and Col. Ashburn, together with the connivance of the United States District Attorney, was a tyrannical use of the military power of this Government. This same branch attempted the same methods in the United States Harness case, *supra*, and was thwarted there. If such acts, of which these men have been guilty, are permitted to go unchallenged, this country will be in no position to complain of the militaristic governments of Europe.

We most respectfully ask that the decree of the United States Circuit Court of Appeals for the Eighth Judicial Circuit be reversed.

Respectfully submitted,

JOSEPH T. DAVIS,

DOUGLAS W. ROBERT,

Solicitors for Petitioners.

ADDENDA. •

District Court of the United States in and for the Eastern
Division of the Eastern Judicial District of Missouri.

Edward F. Goltra,

vs.

Weeks et al.,

Plaintiff,

Defendants.

No. 6639.
In Equity.

Oral Opinion of the Court on Motion to Dismiss Bill.

Faris, J.

Plaintiff entered into charter party, executed by the Chief of Engineers of the United States Army for the leasing or chartering of nineteen barges and four tow-boats, for a period of five years, with the option in lessee to purchase these vessels at the termination of the charter party.

Upon completion of the construction of these vessels they were delivered to the plaintiff, and since have been (until the time hereinafter mentioned) in his possession, and until that possession was interfered with by the defendants in the manner hereinafter more specifically set out.

The parties to this lease or charter party are recited in the instrument thus:

“This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of

War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as the lessee * * * party of the second part."

Plaintiff has sued here for an injunction, both to prevent further interference with his possession of these vessels, and to compel the restoration of them to his possession, charging in this behalf that, being on Sunday, March 25, 1923, in the peaceable and lawful possession of these vessels, that on said date defendant, Ashburn, acting under alleged orders of the defendant, Weeks, forcibly, and without warrant of law, and without due process, or any process of law whatever, came upon said vessels and drove off the servants and employes of plaintiff then in charge thereof, and took and towed these vessels down the Mississippi River, in an effort to get them beyond the jurisdiction of this Court; that such act of the defendant, Ashburn, and the defendant, Weeks, if, in fact, he ordered it to be done, is in contravention of the rights of plaintiff, for that plaintiff's property may not be taken from him without due process of law, and without any process of law whatever, and in contravention of the charter party under which plaintiff got and held these vessels, and in contravention of the constitutional rights of this plaintiff.

Defendants, Ashburn, and Carroll, as District Attorney of the United States (the latter of whom is a mere formal party), were duly served with process. Defendant, Weeks, has voluntarily entered his appearance, and all of these defendants have moved to dismiss the bill of complaint, for that the United States, as the alleged owner of the vessels in dispute, and as the actual lessor thereof, is a

necessary party defendant, without whose presence this action cannot proceed, and since the United States cannot be sued without its consent, this action must fail.

It was suggested on oral argument, that since the contract of charter reserves to the lessor the right to terminate the lease at any time for noncompliance with any of the terms or conditions thereof, whenever in the judgment of the lessor such noncompliance exists, such taking of the vessels was lawful, and no action whatever will lie against either defendants, or against the United States or against anyone else. This oral contention is not referred to in the motion before me, and scant consideration is devoted to it in the briefs. In any event, I think it may be dismissed with the suggestion that the judgment to be exercised by the lessor could not be exercised arbitrarily, or whimsically, or baselessly, and utterly without the existence of any breach on plaintiff's part, as the bill here alleges.

Upon the motion it is contended by defendants, that not only does the language of the charter party make plain that the United States is the lessor, but that inherently the relief which this Court must afford, if it give any, requires that the United States be a party, since valuable alleged vested rights of the latter must of necessity be determined as a condition precedent to the giving of any relief; that the charter party itself, eliminating merely parenthetical recitations of the names of those representing it and designated to act for it, clearly names the United States as the lessor. If the clause designating the parties stood alone, the correctness of this contention would have to be conceded. Such doubt as is thrown upon its correctness, arises from the uniform use of the personal pronoun "he" in designating the lessor, and from the statutory and fact history of these vessels.

If the United States is the lessor, then plaintiff could not be heard to dispute its title, and the case must be dealt with upon the question whether this Court can afford any relief unless the actual lessor is before the Court as a party. Clearly, no permanent order of injunction can be entered here until it is determined whether the law and the facts adduced furnish a warrant for the judgment exercised by the Secretary of War in attempting to declare the charter party at an end, or whether, if the facts do not warrant such action, a proper legal construction of the terms of the charter party warrant such cancellation by the Secretary of War, absent any sufficient defaults on plaintiff's part in carrying it out.

I think it follows, that the lessor must be before the Court before the Court can dispose of the case, or the law must be held to be that the presence of the lessor in court is not necessary, even when valuable rights of the lessor are being determined, when such determination becomes necessary in order to protect the citizen in his constitutional rights against the flagrant violations of those rights by the officers who assume to act for the real lessor.

Reference to the origin and history of the money with which the vessels in dispute were built; to the statutes under which they were built, and to the statutes which provided for their control and ultimate disposition, may serve to throw some light upon the identity of the lessor.

The charter party says, and the bill alleges (and by the bill, under the law, I am bound, for the uses and purposes of this motion to dismiss, and this is so, whether the allegations of the bill be true as a matter of fact or not), that all the money used to construct these vessels was furnished by the United States Shipping Board Emer-

gency Fleet Corporation to the Chief of Engineers of the United States Army.

The Fleet Corporation was organized as a quasi private corporation (though, essentially, it was a public corporation) under the laws of the District of Columbia, on the sixteenth day of April, 1917. All of the fifty million dollars of capital stock of the Fleet Corporation was subscribed, taken and owned by the United States (*Sloan Shipyards v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 566).

By the Act of Congress of June 5, 1920 (41 Stat. 988), the Fleet Corporation was continued in existence, but the title to practically all of the boats, barges, ships and vessels formerly owned and held by the Fleet Corporation was transferred to the United States Shipping Board, which is a mere arm, or administrative bureau of the United States.

However, I am not able to construe the great mass of confusing statutes (confusing, I trust, because of lack of time of this Court, when faced by multitudinous duties, to properly read and understand them), which dealt with the many transportation facilities, by land and water, in an effort to unscramble them following the Great War, as including the vessels here in dispute among those which were transferred to the Shipping Board. On the contrary, I think it is clear that the title to them was left in the Fleet Corporation (so far as title vested in such Fleet Corporation by reason of its furnishing the money with which they were constructed), and, that, likewise the custody and control over them was left where the old statutes and existing contracts about them had placed such custody and control.

For the Act of June 5, 1920, excepted these vessels from

the transfer to the Shipping Board by a proviso to section 4 of said act, which proviso reads:

“Provided: That all vessels * * * assigned to river and harbor work, inland waterways, or vessels for such needs in the course of construction, or under contract by the War Department, shall be exempt from the provisions of this act.”

Since the vessels in dispute were not only “vessels assigned to inland waterways,” but they were still in course of construction, as also under contract, when the Act of June 5, 1920, was passed, by the War Department, to plaintiff here; for, on the second of the above propositions the bill before me says:

“These vessels were not completed until long after said date (that is to say May 28, 1919, the date of the contract) and were not delivered to plaintiff until July 15, 1922.”

Whether this allegation is true or not, does not, of course, concern me now, because I am bound (as heretofore said) by what the petition alleges, so far as the motion to dismiss, at least, is concerned.

I am of opinion, then, that the title and ownership of these vessels (again, so far as such title and ownership could be predicated on the source of the money used to build them) was left by the Act of June 5, 1920, in the Fleet Corporation, and that the custody and control over them was in the War Department; that this custody and control in the War Department arose solely by reason of the fact that the \$3,860,000.00 with which they were constructed had been paid by the Fleet Corporation to the Chief of Engineers of the United States Army, and, since the Chief of Engineers of the United States Army was

subordinate to and acted under orders of the War Department. So far as I have been able to see, this chain of circumstances, and this alone, puts the custody and control of these vessels in the Secretary of War.

Some corroboration of this view is lent by some of the provisions of the so-called Transportation Act of February 28, 1920 (Section 201, Act of February 28, 1920). By the provisions of the latter act, all boats and vessels on inland waterways, which had come into the control of the United States by virtue of the provisions of Paragraph 4, Section 6 of the Federal Control Act, or which had been built with any money out of the five hundred million dollars revolving fund provided by section 6, *supra*, were transferred to the custody and control of the Secretary of War. But these vessels were not obtained pursuant to the provisions of Paragraph 4, Section 6 of the Federal Control Act, nor were they built out of any part of the revolving fund provided in said Section 6 of the Federal Control Act.

This view is corroborated by a further provision of Section 201 of the Transportation Act, which does specifically deal with and refer to the vessels in dispute. This is clause (d) of said section 201, which reads thus:

“Any transportation facilities owned by the United States and included within any contract made by the United States, for operation on the Mississippi River above St. Louis, the possession of which reverts to the United States at or before the expiration of such contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above St. Louis.”

A further provision of said Section 201 of the Transportation Act, contained in clause (e) thereof, provided,

that all merchant vessels owned by the United States, in whole or in part, when operated by the Secretary of War, or by the Shipping Board, should be subject to all laws, regulations and liabilities affecting, or applicable to, privately owned merchant vessels. But I put no stress upon this, for it so clearly limits the laws, regulations and liabilities to admiralty laws and maritime regulations and liabilities, as that it can furnish no light here.

Moreover, this view is strengthened, and the application of even admiralty laws is modified, by the provisions of the Act of March 9, 1920 (41 Stat. 525), whereby, *inter alia*, it is provided, that no vessel of the United States, or of any corporation in which all the capital stock is owned by the United States, shall be proceeded against by any seizure in admiralty or in rem.

The above Act of March 9, 1920, recognized and dealt with the fact that when it was passed there were still in existence boats and vessels, the title and ownership whereof was in a corporation wherein all the capital stock was owned by the United States. This affords an additional reason for the view I have already expressed, that the Transportation Act did not transfer either the title, custody or control of these vessels to the Secretary of War, but left such title, custody and control (particularly title) where they had always been. There can be, I think, no doubt that the Act of June 5, 1920, already discussed, did not transfer the vessels to the Shipping Board.

Since, from the view above expressed to the specific application of clause (d) of Section 201, *supra*, of the Transportation Act, to the vessels here in controversy, it may be argued, that this language completely forecloses any contention that the United States is not the owner of these vessels, I may observe in passing, that there can be no doubt that the United States is the beneficial

owner of them. It owns them because it owned, and now owns, all of the capital stock of the Fleet Corporation, which furnished the money to build them, and because the United States appropriated all the money to the Fleet Corporation which the latter ever used or ever had. But, in a sense, the United States was a cestui que trust of these vessels, holding, as said, the complete beneficial title thereto, while the Fleet Corporation, a quasi private corporation, was the trustee holding the legal title.

In such situation, both Congress and the United States dealt with these vessels as if the United States not only was the absolute owner of them (as it was, in effect), but had the legal title to them, also absolutely.

If the statutes above considered have been correctly interpreted by me; if I have not overlooked, in the confusing mass of statutes passed in an effort to return to pre-war normalcy, and in the face of lack of time for careful inquiry incident to the hundreds of other pressing matters and duties confronting me, some applicatory statute, I think a few enlightening principles have been established. These are:

(a) That the vessels here in controversy were built with money furnished by the United States Shipping Board Emergency Fleet Corporation;

(b) That the said Fleet Corporation was a quasi private corporation, in which all of the capital stock was owned by the United States;

(c) That all of the money with which the Fleet Corporation operated came either out of the proceeds of the sale of certain Panama Canal bonds (Act of September 11, 1916, 39 Stat. 728), or was appropriated to the Fleet Corporation by Congress from the revenues of the United States, by the Act of March 1, 1918 (40 Stat. 438), or, by the Act of July 1, 1918 (40 Stat. 634);

(d) That this money which so built these vessels was turned over by the Fleet Corporation, for this purpose, to the Chief of Engineers of the United States Army, who is an officer of the United States, acting under and by orders from the Secretary of War;

(e) That these vessels being thus created and held, were chartered to plaintiff by the Chief of Engineers of the United States Army, who acted in such behalf by direction of the Secretary of War;

(f) That these vessels, being so under contract, did not pass to the Shipping Board, or to the custody and control of the Secretary of War, unconditionally;

(g) And that, the Secretary of War will only obtain unconditional custody and control of them when they shall have reverted to the United States, at or before the expiration of the contract existing, and here in question. Of course, it is not intended to be said, that since somebody must, in case of exigencies, act for the United States, that the Secretary of War has no power so to act.

In the late case decided by the Supreme Court of the United States, it was held that the Fleet Corporation could be sued, and that a suit against it was not a suit against the United States, within the rule that a sovereign may not be sued without its consent (*Sloan Shipyards v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549).

This case here at bar, it is true, is not an action against the Fleet Corporation directly, but it is an action concerning vessels constructed with the funds set aside for the Fleet Corporation. Neither is it a suit against the United States, directly. On the face of it, the action is no more directly against the United States than it is against the Fleet Corporation. Indirectly, it is against the Fleet Corporation, and not against the United States.

Numerous cases, some of which are relied on by counsel for defendants as on all fours with the case at bar, are called to my attention. Generally, these cases are of the type of *Wells v. Roper*, 246 U. S. 355; *Oregon v. Hitchcock*, 202 U. S. 60; *Naganab v. Hitchcock*, 202 U. S. 473; *Stanley v. Schwalby*, 162 U. S. 255; *Louisiana v. Garfield*, 211 U. S. 70; *Louisiana v. McAdoo*, 234 U. S. 627, all of which were cases dealing with rights, property and attributes of the United States accruing to it in its strict capacity as a sovereign. These cases dealt with lands, or titles thereto, held by the United States under alodial tenure as a sovereign, with vessels (*vide*, *The Siren*, 7 Wall. 152) captured by it in war, with import duties levied pursuant to constitutional grant of power, with matters pertaining to post offices and post roads, and others of a similar sort had, done and transacted by the United States pursuant to constitutional grant of power in its strict governmental capacity as a sovereign.

The case of *Kaufman v. Lee*, 106 U. S. 196, wherein suit was brought in ejectment against Kaufman, as the officer, agent and terre-tenant of the United States, which was the owner of lands held by it in fee, as a national cemetery, and for use in some obscure way as a military reservation, and *Stanley v. Schwalby*, 162 U. S. 255, wherein a like suit to recover possession of land held for a fort by the United States, was brought against the terre-tenant, seem to illustrate the distinction.

In the former case it was said the suit could be maintained without joining the United States as a party, although the United States contended that it owned the land in controversy in fee. In the latter case it was held that the suit was one against the United States, and that it could not be maintained.

It is true the Supreme Court of the United States does not put the distinction on any such ground as that referred to above, but to me it seems that the distinction perhaps subsists. The difference between the two cases, as they are distinguished by the Supreme Court in the Stanley case, is that in the Lee case the title of the United States was clearly bad, and that of the plaintiff therein clearly good; while in the Stanley case the converse was, respectively, present. Such a distinction seems unfortunate, for it would seem that, since the United States cannot be sued without its consent, no court could ever get to the point of ascertaining whether the cause of action against it was good or bad. Having no jurisdiction to entertain the action at all, it would, by the same token, have no jurisdiction to ascertain whether the plaintiff had, or had not, a good cause of action, and the United States, the real defendant, a bad or worthless defense, which, after all is said, is the only subject of a lawsuit.

But the Lee case, *supra* (Kaufman, the terre-tenant, alone was sued, and the United States, though it defended the action, expressly declined to submit to the jurisdiction of the trial court, though after adverse judgment below, it took an unwarranted writ of error) does hold that when the United States, acting from necessity through its officers, since it cannot function otherwise, takes the property of a citizen without due process of law, and without just compensation, and in utter disregard of right, of law and of constitutional guaranties, and so taking such property, attempts to retain it for and on the alleged behalf of the United States, the lawfulness of a possession so acquired, and the title to property so illegally, unrighteously and unjustly obtained, may be inquired into by the

courts, even though the United States be not made, and cannot be made, a party to the action in which such inquiry is had.

This is, I think, the real, legal distinction between the Lee case and the Stanley case. So, should I in haste have erred in holding that the United States is not the lessor, by the terms of the charter-party, the Lee case is yet authority for the view that, by flagrant acts of its officers, through whom it alone can function, the United States may, in a sense, be estopped from benefiting by such unlawful and unconstitutional acts.

I am of opinion that the facts alleged in the bill, when viewed in the light of the statutory history of the alleged title to these boats in the United States, furnish a sufficient reason why the United States is not a necessary party. Everybody, of course, concedes that, if it is a necessary party, then this Court has no jurisdiction; that it cannot be proceeded against without its consent, and that this consent, it is likewise conceded, has not been vouchsafed in this case.

But even if this fact of title in the United States be conceded as being absolute, even if the Sloan Ship Yards case be not controlling, the right to the possession of these boats was in the plaintiff, until that right was by wanton force interfered with, without due process of law, and in utter disregard of the law and of its processes. Not only were the boats taken, as the petition alleges, without any process of law, but they were taken in utter disregard of the instructions of the Secretary of War, which instructions ordered defendant Ashburn, who actually did the taking, to institute legal proceedings for their recovery, in the event that plaintiff refused to deliver them up. Such proceedings as were actually ordered by the Secre-

tary of War would have constituted that due process of law which the Federal Constitution vouchsafes to even the meanest of its citizens.

What was said by Mr. Justice Miller as to the facts and situation in the Lee case particularly and peculiarly applies to the facts alleged in the petition here. That was a case, in the opinion of this Court, not nearly so flagrant as the one before me, but Mr. Justice Miller saw fit to characterize what was done in that case in this pertinent and apposite language:

“No man,” said Mr. Justice Miller, “in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office participates in its functions, is only the more strongly bound to submit to the supremacy and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class.

“Shall it be said, in the face of all this, and of the acknowledged rights of the judiciary to decide in proper cases statutes which have been passed by both branches of Congress, and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his

property by force, his estate seized and converted to the use of a government without lawful authority, without process of law and without compensation, because the President has ordered it, and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights."

But little can be added to language like this. It fits the case at bar, as the case at bar is pleaded, and with the latter, at this stage, I repeat, I am alone concerned. Certainly, no government, which with mighty hand compels its citizens to abide by the law, ought itself, in time of peace, to break its own laws, or refuse to follow itself that law which it compels others to abide by. Neither can the Government afford to take the unlawful fruits accruing from illegal acts perpetrated by those who assume to act for it, and in its name. Even if it should be conceded, for the sake of argument, that no action could be maintained by plaintiff, nor anyone else, affecting the title or possession of these vessels in dispute, or affecting the charter party, or its construction, without the United States were a party, if defendants had come lawfully into possession of them, yet this would not at all militate against the view that a possession obtained, as here, can be examined into by the courts. Since the taking is alleged to have been done by force, and unlawfully, without due process of law, and without regard to the law, and without regard to the instructions, even of the Secretary of War, who advised, and, until lately, at least, countenanced only lawful repossession, the presumption ought to be entertained, that the acts of de-

fendant were not done by and with the consent of the United States, but, on the contrary, were done against its will and consent.

It is persuasive that a similar view, in a very similar case, has lately been taken by Judge Baker, United States District Court of the Northern District of West Virginia.

However, if no other reasons could be given for this view, except those of a profound respect for the law, and its processes, and a profound respect for the honor and dignity of this Government, these alone ought to suffice.

Without more, I am of the opinion that the motion to dismiss on the grounds now urged by defendants ought to be overruled, and so it will be ordered.

April 30, 1923.

St. Louis, Missouri.

APR 26 1928

WM. R. STANSBURY

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

EDWARD F. GOLTRA,

Petitioner,

v.

DWIGHT F. DAVIS, Secretary of War
of the United States, Successor to
JOHN W. WEEKS, Secretary of War
of the United States, COL. T. Q.
ASHBURN, Chief Inland & Coast-
wise Waterways Service of the
United States, and JAMES E. CAR-
ROLL, United States District
Attorney,

Respondents.

No. 718.

PETITIONER'S REPLY BRIEF.

JOSEPH T. DAVIS,
DOUGLAS W. ROBERT,
Solicitors for Petitioner.



IN THE
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PETITIONER'S REPLY BRIEF.

Page eight (8) of brief of respondents quotes one paragraph of the bill of complaint, and in so doing certain phrases are italicized.

We take this means of calling the Court's attention to the printed transcript of record in this case for the pur-

pose of stating that the clerk of the court below erred in printing the bill of complaint, in that the bill of complaint does not emphasize any word or phrase, and that the words and phrases printed in italics is error. A certificate of the Clerk of the United States District Court is printed and hereto attached, the original of which has been filed with the clerk of this court.

The hurriedly drawn bill, as a whole, makes no admissions as claimed by the respondents, but, on the contrary, the bill, the facts and the circumstances emphasize the fact that the intention of the Secretary of War was to control the rates to be charged, and that he arbitrarily placed restrictions upon the petitioner herein to prevent competition with the Federal Barge Line operated under the respondents, the Secretary of War and Col. Ashburn. The facts further disclose that the petitioner herein was afforded no opportunity to even operate under the restrictions imposed, for the reasons that the boats and barges were in his possession about seven and one-half months, and during that period he was unable to operate for at least three and one-half months on account of the closed navigable season, and for other periods of time consumed in experimental work and making the newly designed equipment adaptable for use on the Mississippi River and its tributaries. Although restricted as indicated, the petitioner did operate the fleet.

I.

The case cited by respondents under point I of their summary of points and authorities and referred to in their argument on page 16 of their brief, viz., *Cunningham v. Railroad Company*, 109 U. S. 446, has no application here.

That was an action to foreclose a mortgage on real estate, the title to which was in the State of Georgia.

II.

An examination of the cases under point II, cited by the respondents, are similar to the case of *Cunningham v. Railroad Company*, *supra*, and are not applicable to the case under consideration.

With the following exceptions the cases cited are referred to in petitioner's original brief:

Hagood v. Southern, 117 U. S. 52, was an action to compel state officers to levy taxes.

Goldberg v. Daniels, 231 U. S. 218, was a suit by a bidder to compel the Secretary of the Navy to deliver a condemned cruiser belonging to the United States which had been advertised for sale.

The facts in the case of *Belknap v. Schild*, 161 U. S. 11, disclose that this was an action to enjoin officers of the United States from using a caisson gate which had been purchased and paid for by the United States and was in possession of the United States.

In the case of *New Mexico v. Lane*, 243 U. S. 52, the

State of New Mexico undertook to establish title in it to certain land, the title to which was in the United States, and to restrain the Secretary of Interior from disposing of the property.

The case of *Louisiana v. Garfield*, 211 U. S. 70, was a suit to establish title to real estate in an abandoned military reservation of the United States.

In *Leather v. White*, 296 Fed. 477, a minority stockholder sought to recover back certain real estate which had been transferred to the United States.

IV.

None of the cases cited by respondents under point IV has any application to the question involved under that point.

The evidence referred to under this point is the letter of cancellation signed by Lansing H. Beach, Major General, Chief of Engineers, dated April 27, 1923 (Rec., p. 90). The lower court properly refused to allow this letter to be introduced.

This purports to be a letter by the Chief of Engineers, the lessor named in the lease contract, addressed to Mr. Goltra, and undertakes to terminate the lease contract in practically the language used in a similar letter dated March 3, 1923, signed by John W. Weeks, Secretary of War (Rec., p. 67).

In this connection, it will be noted that the seizure took place March 25, 1923, and the bill of complaint was filed

March 25, 1923. The returns of the respondents had been filed on April 17, 1923, and prior thereto, and the motions to dismiss and quash, filed on April 17, 1923, had been presented and were under submission, at the time the Chief of Engineer's letter of April 27, 1923, was written and served on the petitioner herein on April 30, 1923 (Rec., p. 88), the very day the District Court overruled the motions to dismiss and quash (Rec., p. 44).

This was clearly an afterthought of the respondents. Although it was properly rejected as evidence in this case, the respondents see fit to refer and comment thereon as if it were a part of this record.

While the letter is not considered as evidence, but since respondents comment upon it, may we not call attention to the fact that they recognized the correctness of the interpretation placed upon the contract of lease by the Chief of Engineers as the Chief of Engineers being the lessor referred to in the contract, and particularly in clause 8 of said contract.

The Chief of Engineers being the party to the contract had the right to interpret the same, and by his acts and conduct he had the right to declare the meaning of the contract from the lessor's point of view.

United States v. Mason & Hanger Co., 260 U. S. 323.

If the Chief of Engineers was and is the lessor under Clause 8 of the contract, then he was the only party who could exercise any power or authority, if any power or

authority, as contended by respondents, is given in that clause or paragraph.

Sanborn, Circuit Judge, in his dissenting opinion in this case, covers this point in the following language (Rec., p. 138):

“It will be noticed that the only condition that would justify the termination of the lease and the return of the property to the lessor was the non-compliance by the lessee in the judgment of the lessor Black with the terms of the lease, while the defendants’ claim to possession rests on noncompliance in the judgment of Honorable John W. Weeks, Secretary of War. The large value of the property subject to this lease and contract, the serious effect of the decision to be rendered by the judgment of Mr. Black leave no doubt in the mind of the writer that the plaintiff entrusted this decision to and relied upon the individual wisdom, experience, knowledge, just and deliberate fairness of Mr. Black. The record does not disclose any decision of this question of noncompliance by him or any consent or agreement by the plaintiff to substitute the judgment of Honorable John W. Weeks, Secretary of War, or of any other person or officer for that of Mr. Black; and it seems to the writer that the judgment of Mr. Weeks, the Secretary of War, was not binding upon the plaintiff, was unauthorized and ineffective. When two opposite parties agree to submit a controversy between them to the judgment of a chosen arbiter in whose fairness, wisdom, deliberation and discrimination they have confidence and to abide by his decision, the con-

sent and agreement of both is indispensable to the substitution of another individual as arbiter in his place."

In addition to the foregoing, we desire to quote from Sugden on Powers, page 266:

"So, wherever a power is given over real or personal estate, and whether the execution of it will confer the legal or only the equitable right on an appointee, if the power repose a personal trust and confidence in the donee of it to exercise his own judgment and discretion, he cannot refer the power to the execution of another."

V.

Under point V respondents cite a number of cases, all of which originated in the Court of Claims upon specific and express provisions in contracts mutually agreed upon, without ambiguity, wherein one party was designated as the sole arbiter, judge or inspector, whose decision was agreed to be final and binding. All of these were building or construction contracts or agreements of similar import. A short reference to each case will show that the same has no bearing upon the issues in this case, which issues are more fully discussed in our original brief.

Kihlberg v. United States, 97 U. S. 398, was a claim under contract to transport military, Indian and Government stores. The contract expressly gives to the Chief

Quartermaster the sole power and authority to ascertain and ~~fix~~ the distance to govern in the settlement of the contractor's accounts.

In *Sweeney v. United States*, 109 U. S. 618, the Court had under consideration a claim for the construction of a brick wall at the National Military Cemetery. The parties mutually agreed, in contract, to an inspector whose certification was to be final. In this case, the inspector had condemned brick during the period of construction. The contractor used the condemned brick after rejection. The inspector refused to certify upon completion.

Time was of the essence of the contract for excavation on a canal in the case of *United States v. Gleason*, 175 U. S. 588. The parties to this contract designated the Chief of Engineers with final power to terminate the contract. The terms and conditions were definitely and clearly set forth. There were several extensions granted. The contractor failed to comply and never did complete the work.

The case of *United States v. Mason & Hanger Co.*, 260 U. S. 323, grew out of a contract, in the nature of "cost-plus," for the erection of buildings at Camp Zachary Taylor. The contract provided for monthly statements of the elements of costs, upon which, if there be any disagreements, the decision of the contracting officer "shall govern."

No possible construction can be placed upon the contract in question which would cause it to be read as an

unambiguous right, power and authority to the Secretary of War or the Chief of Engineers to arbitrarily cancel the same. Even if such strained construction could be placed on the terms of the contract, such action could not be had "upon mere guesses and surmises without information or knowledge on the subject."

United States v. Barlow, 132 U. S. 271.

The lessor placed his own construction on clause 8 of the contract as an "Inspection" provision. There is no evidence that an inspection was ever made, and no evidence to the effect that any effort was made to secure direct knowledge of the conditions. On the contrary, Mr. Goltra, in his letter of March 8, 1923 (Rec., p. 69), stated:

"The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has in fact no substantial basis on which to rest. This I believe will be fully demonstrated to you if I am granted a fair and impartial hearing to which, as a citizen, I am entitled, and which, in fairness and justice, I now request."

VI.

Respondents, under point VI, undertake to refute the argument of petitioner that the United States was not acting in its sovereign capacity, nor in a governmental capacity, but as a trader engaged in a commercial enter-

prise, and rely upon *North American Com. Co. v. U. S.*, 171 U. S. 110, and *U. S. v. Bank of Metropolis*, 15 Pet. 392.

In the case of *North American Com. Co. v. U. S.*, the United States sought to recover rentals and taxes under a lease executed by the Secretary of the Treasury under certain acts of Congress for the protection and preservation of fur-bearing animals on the islands of St. Paul and St. George in Alaska, "a special reservation for Government purposes." There was and is no dispute about the United States acting in its sovereign and governmental capacity by exercising its power to regulate the seal fisheries in the interest of the preservation of the species, but the case has no application to the case under consideration.

The same may be said of the case of *U. S. v. Bank of Metropolis*. On the contrary, the Court, in that case, holds that where the departments of the Government accept drafts, unconditionally, the United States assumes the same liability as private parties in commercial paper transactions.

Respectfully submitted,

JOSEPH T. DAVIS,

DOUGLAS W. ROBERT,

Solicitors for Petitioner.

ADDENDA.

United States of America,
Eastern Division of the Eastern } ss.
Judicial District of Missouri.

In the District Court of the United States Within and
for the Eastern Division of the Eastern Judicial

District of Missouri.
Edward F. Goltra,
Plaintiff,
vs.

John W. Weeks, Secretary of War of
the United States, Colonel T. Q. Ash-
burn, Chief Inland and Coastwise
Waterways Service of the United
States, and James E. Carroll, United
States District Attorney,
Defendants.

In Equity.
No. 6339.

I, Jas. J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify, that upon an examination of the records of this court in the above-entitled cause, it is disclosed that this office in the preparation of the transcript of record on appeal of defendants to the United States Circuit Court of Appeals for the Eighth Circuit inadvertently showed certain designations and matter in the bill of complaint to be in italics, more specifically the following, as same appear in the printed record on such appeal at the pages indicated, to wit: "Secretary of War" and "satisfaction of the lessor," appearing on page 5; "Secretary of War," ap-

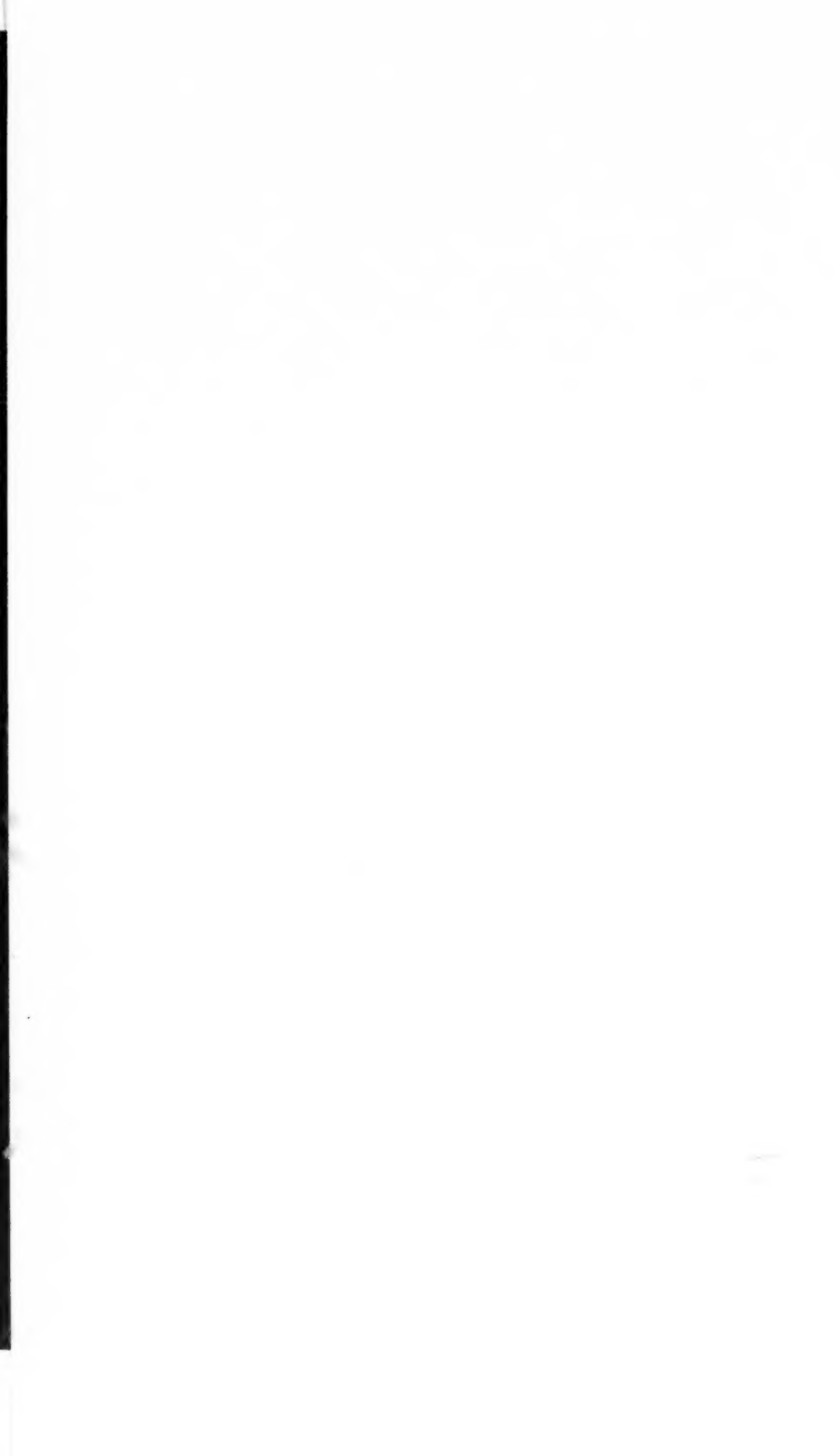
pearing twice on page 6; "United States," appearing partly on page 6 and partly on page 7; "Secretary of War," appearing twice on page 7, and "the lessor" and "approval of the lessor," also appearing on said page 7; "Secretary of War," appearing twice on page 8 and "the lessor," appearing three times on said page 8; "United States," "the lessor" and "his judgment," appearing on page 9; "lessor" and "being the United States," appearing on page 18. That such designations and matter, as aforesaid, is not italicized in the original bill of complaint on file in said cause.

In witness whereof, I hereunto subscribe my name and affix the seal of said court at office in the City of St. Louis, in the Eastern Division of said District, this 23rd day of April, A. D. 1926.

JAS. J. O'CONNOR,
Clerk.

(Seal)

By JOSEPH M. WALSH,
Deputy Clerk.



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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 718

EDWARD F. GOLTRA, PETITIONER

v.

JOHN W. WEEKS, SECRETARY OF WAR OF THE United States, Col. T. Q. Ashburn, Chief Inland & Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney, respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS OF THE LOWER COURT

The transcript of record contains no opinion by the District Court, but the brief in support of this application (p. 29) contains the oral opinion of the Court (Faris, D. J.), overruling the Government's motion to set aside a mandatory injunction which it had entered and to dismiss the bill. The opin-

ions of the Circuit Court of Appeals have not been officially reported. However, the majority opinions (Pollock, D. J., Symes, D. J.) reversing the orders and decree of the District Court will be found on pages 105-131 of the transcript of record. The dissenting opinion (Sanborn, C. J.) appears at page 131. For convenience, the majority opinions appear as an appendix to this brief (pp. 9, 38).

On June 4, 1923, the Government made application to this Court for leave to file its petition for writ of prohibition and/or mandamus restraining the Honorable Charles B. Faris, Judge of the District Court, from asserting and exercising jurisdiction over such suit and proceedings. (No. 23, Original, October Term 1923.) This Court denied the application, stating the proper remedy to be by appeal to the United States Circuit Court of Appeals. (*Ex parte in the Matter of the United States as Owner of Nineteen Barges and Four Towboats, Petitioner*, 263 U. S. 389.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 23, 1925, and the present application made September 2, 1925. The reasons upon which petitioner relies for the allowance of a writ of certiorari are set forth on pages 3-5 of his petition. Jurisdiction to issue the writ is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (43 Stat. 936, c 229.)

STATEMENT

We adopt the review of the facts stated by the majority opinion of the Court (Pollock, D. J.), which are made an appendix to this brief. (*Infra* p. 9.) Substantially the same review was made by the Government's petition and supporting brief for the writ of prohibition filed in this Court. (No. 13 Original, October Term 1923.) The substantial questions involved are (a) whether this suit is one against the United States, and (b) whether the District Court had authority to review the discretion and judgment of the Secretary of War in declaring the conditions of the lease for the vessels in dispute violated and to cancel the lease. The majority opinion of the Circuit Court of Appeals has answered the first question in the affirmative and the second in the negative.

The present application assigns these reasons why the judgment of that court should be reviewed by this Court:

(1) That the majority decision of the Circuit Court of Appeals is in conflict with applicable decisions of this Court and in conflict with the weight of authority.

(2) The majority opinion has decided an important question of law in a way untenable and in conflict with the Fifth Amendment of the Constitution of the United States.

(3) The majority opinion has decided important questions of Federal law which should be settled by this Court.

Our view is that **there** is no occasion in this case for the review of the decision of the Circuit Court of Appeals by certiorari or otherwise. There is no conflict in the decisions of the various Circuit Courts of Appeals, nor is the majority decisions in conflict with the decisions of this Court. The questions suggested are not of general interest except to the immediate parties to the litigation.

ARGUMENT

This Court in the prohibition proceedings has clearly indicated that the questions which this litigation suggests were questions to be considered by the Circuit Court of Appeals in the usual manner. (*In the Matter of the United States as Owner of Nineteen Barges and Four Towboats*, 263 U. S. 389.) While the question as to whether a suit, although nominally not against the United States, is so in effect and consequence, has been variously decided, yet it has been so decided upon consideration of distinctly different sets of facts, definite principles controlling according to the facts. When the decisions of this Court are analyzed, there is no real substantial conflict in them. The principles to be applied have been clearly laid down and long settled. The facts in the recent case of *Wells v. Roper*, 246 U. S. 335, are so in line with the facts in this case and the principles of decision as applied to such facts are so clearly announced that it is difficult to understand how it could be contended that this Court could arrive at a different conclu-

sion without overruling that case, which it is not asked to do. We adopt the review of the cases and the conclusions of the majority opinions of the Circuit Court of Appeals as our argument. (Appendix pp. 9-45.)

The contract in question clearly reserved to the Government the right to rescind the contract in the exercise of the judgment and discretion of its executive official. It is difficult to understand how it can be seriously contended that this exercise of judgment and discretion of this official can be judicially reviewed, in view of the long line of cases denying such a review.

We see no soundness in the suggestion and argument that because the Government of the United States made this contract for the lease of the boats to the petitioner it has divested itself of its sovereignty insofar as the contract is concerned. The Government in making this contract and in all its dealings with these boats was acting as a sovereign. Under the obligation of prosecuting the war, the Government, through its executive department, caused the boats in question to be built for war purposes. When the war ended, acting in the same capacity, it undertook to make disposition of this war material for which it no longer had such use. It did not do this through any corporation created by it or through other authority. It was not a stockholder in any corporation, as in the case of *Bank of United States v. Planters Bank of Georgia* (9 Wheat. 904) and like cases. That case decided

that because the State happened to be a stockholder in a bank that fact did not confer upon the bank immunity from suit possessed by the State. The stockholders of a corporation have no identity with the corporation itself.

The Secretary of War was justified in canceling the contract with Goltra. Very slight limitations were placed upon the character of commodity to be carried by the vessels. The public purpose to be served was providing adequate transportation by the operation of the boats as common carriers in service on the Mississippi River. The contract reserved to the Secretary of War the right to fix the rates, and the rates granted were the same as those of the Mississippi Warrior Service, with the exception of one or two commodities as to which there were inadequate facilities for handling at New Orleans. The petitioner made two slight movements of freight while possessed of these boats. The employment of the boats as common carriers serving the public was one of the substantial considerations moving the Government to enter into the contract. Without their use in service by the petitioner the Government could receive no payment for them. Without their use the community could receive no benefit from them. But, waiving these considerations, the executive officer of the Government exercised his judgment and discretion, and, having exercised it, whether he exercised it correctly or incorrectly, is not a matter for the review and determination of the courts.

The majority opinions of the Circuit Court of Appeals fully and clearly review the two substantial questions which the record presents. These opinions appear as an appendix to this brief.

CONCLUSION

It is respectfully submitted that this application should be denied.

WILLIAM D. MITCHELL,
Solicitor General.

IRA LLOYD LETTS,
Assistant Attorney General.

LON O. HOCKER,
Special Assistant to the Attorney General.

J. FRANK STALEY,
*Special Assistant to the Attorney
General, In Admiralty.*

SEPTEMBER, 1925.

APPENDIX

Opinion

United States Circuit Court of Appeals, Eighth
Circuit

NO. 6871.—MAY TERM, A. D. 1925

Appeal from the District Court of the United
States for the Eastern District of Missouri

JOHN W. WEEKS, SECRETARY OF WAR OF THE
United States et al., appellants

vs.

EDWARD F. GOLTRA, APPELLEE.

Mr. LON O. HOCKER, Special Assistant to Attorney General, for appellants.

Mr. JOSEPH T. DAVIS and Mr. DOUGLAS W. ROBERT (Mr. CHARLES CLAFLIN ALLEN was with them on the brief) for appellee.

Before SANBORN, *Circuit Judge*, and POLLOCK and SYMES, *District Judges*.

POLLOCK, *District Judge*, delivered the opinion of the Court.

For convenience, the parties will be designated as they stood on the record below.

This appeal brings before this court for review an order granting appellee, plaintiff below, a temporary mandatory injunctive order against appellants, defendants below, enjoining and command-

ing them to restore to said plaintiff at the Port of St. Louis certain towboats, barges, and other appliances theretofore by him held in possession under and by virtue of a certain written agreement of lease entered into between plaintiff and the United States through its agent and representative designated by the Honorable Secretary of War on the 28th day of May, 1919, until defendant below, the Honorable Secretary of War, acting under and in pursuance of the terms of said lease, on March 3, 1923, determined the conditions of said lease had been broken by plaintiff and declared the same terminated, and directed the restoration of the government's property to its representative at the Port of St. Louis, Missouri. Said order of the Honorable Secretary of War terminating the lease not having been complied with by direction of the Secretary of War the fleet of barges and towboats and handling facilities at St. Louis were seized by order of the War Department by Colonel T. Q. Ashburn, Chief of the Inland and Coastwise Waterways Service, when the order sought to be reviewed was entered.

But two questions are presented by this appeal. The solution of these questions determine the controversy. They are as follows:

- (1) Is this suit one in legal effect and intentment against the Government of the United States?
- (2) Is the question presented as to the right of the Government to retake the leased property one committed to the decision, judgment, and discretion of an official of the Government, or is it a justiciable controversy for submission to and decision by a court of justice?

The controversy arises in this manner:

Growing out of the emergency created by the late war the necessity arose, or was thought to arise, of having towboats and barges on the upper Mississippi River employed in carrying coal and iron ore and other heavy minerals to St. Louis to be there used in the manufacture of iron needed in the production of munitions of war. To subserve this purpose the United States Shipping Board Emergency Fleet Corporation allotted to the Chief of Engineers of the United States armies the sum of three million eight hundred and sixty thousand dollars with which to have constructed at Point Pleasant, West Virginia; Pittsburgh, Pennsylvania; and Keokuk, Iowa, under contract of August 1, 1918, nineteen barges, and under plans and specifications prepared for such purpose by the Government, either three or four towboats. These barges having been constructed, or nearing completion, and the towboats had been contracted for when the Armistice was signed and the emergency of war ended. The Government then desiring to make some disposition and use of the fleet, and there having been prior negotiations with plaintiff, the written contract of lease, the terms of which are in controversy herein, was entered into on the 28th day of May, 1919, as follows:

"1. This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as

the lessee, his heirs, executors, and administrators, party of the second part, witnesseth, that—

“Whereas the party of the second part at the request of certain government officials as an emergency of war, in order to increase the output of pig iron, made certain arrangements for iron ore and coal properties with a view to producing pig iron at St. Louis, Missouri; and

“Whereas the United States Shipping Board Emergency Fleet Corporation, allotted to the Chief of Engineers the sum of \$3,860,000 for the construction of a fleet of towboats and barges for the primary purpose of transporting the said iron and coal to and from St. Louis, Missouri; and

“Whereas on the first day of August, 1918, the United States of America entered into contracts for the construction of nineteen barges suitable to use for the transportation of said iron ore and coal; and

“Whereas the United States of America is about to construct by contract or otherwise a fleet of towboats for the purpose of towing the said barges, the construction of which in the opinion of the Secretary of War is necessary to enable the government to dispose of the said barges more advantageously; and

“Whereas the said fleet of towboats and barges is especially designed for and adapted to the transportation of iron ore and coal; and

“Whereas the said lessee has entered into various engagements and undertakings to increase the pig iron supply as a war measure, which may have created, and according to the contention of the lessee did create, obligations on the part of the United States to the said lessee, but which he en-

tirely releases and discharges in part consideration of this lease, which engagements, undertakings, and lease are in furtherance of the original design for the assembling of coal and iron ore at St. Louis, Missouri, and for the increase of pig iron facilities:

“ Now, therefore, the said lessor doth hereby charter and lease unto the said lessee for a term of five (5) years, beginning with the date of delivery to the lessee of the first barge or towboat and terminating five (5) years after the delivery of the first barge or towboat the following described property, viz:

“ Nineteen barges which are being constructed under contracts dated August 1, 1918, with the Marietta Manufacturing Company, of Point Pleasant, W. Va., the Dravo Contracting Company, of Pittsburgh, Pa., and the Dubuque Boat & Boiler Works, of Dubuque, Ia., and three or four towboats about to be constructed and described in accordance with specifications prepared or to be prepared therefor.

“ It is thereupon covenanted and agreed between the said parties as follows:

“ 2. (a) That the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal, and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made provided

the Secretary of War consents to such use other than as a common carrier.

“(b) That the lessee shall pay all operating expenses of the fleet and maintain, during the continuance of the lease, each towboat and barge of the fleet in good operating condition to the satisfaction of the lessor; and shall hold the United States entirely free from all liabilities and indebtedness of every kind in connection with the operation, care, and maintenance of the entire fleet and all its engines, boilers, outfit, tackle, apparel, furniture, and appurtenances; and the lessee shall, without unnecessary delay, as soon as he acquires any knowledge thereof, discharge any and all maritime liens that may at any time during the continuance of this lease from any cause arise against or become impressed upon any one, any or all of the fleet of nineteen barges and three or four towboats. The lessee shall procure and take out for the benefit of the United States, insurance, both fire and marine, in such an amount as in the judgment of the Secretary of War each of the vessels may require and with such underwriters or in such companies as are approved by the lessor, insuring each and every one of the barges and towboats against physical injury to them, or any of them, and against the loss of any or all of the barges and towboats hereby leased. The lessee shall likewise procure and take out fire, marine, and towage liability insurance in such an amount as in the judgment of the Secretary of War each of the vessels may require with such underwriters or in such companies as shall be approved by the lessor, and for the benefit of the United States, insuring each of the vessels against such injury as

may be inflicted by such vessel upon other property, such as might result in maritime liens, or in liability or obligation by the lessor, and, if the lessor shall require, execute and deliver to the lessor, a bond in the penal sum of three hundred thousand (\$300,000) dollars, conditioned to protect the United States against such liability or obligation and against any and all maritime or other liens against the fleet or any of the vessels of the fleet and against any and all depreciation in value of all or any of said vessels, by reason of maritime or other liens arising or becoming impressed upon them or any of them. Such bonds as in any part of this contract are required to be given by the lessee for the benefit of the United States shall always and at all times during the continuance of this lease be kept good, and shall be replaced at any time by other good and sufficient bonds at the request of the lessor, and they shall be kept good not only against the impaired creditor or financial responsibility of the obligor or surety, but also against partial depletion or entire exhaustion thereof brought about by the payment of losses or indemnities thereunder.

“(b-1) All salvage earned, to which any of the said fleet shall become entitled, shall be for the benefit of the United States, after deducting all expenses incident thereto and the proportion due to the master, officers, and crew.

“(c) For the protection of persons furnishing materials, services, and labor in connection with the operation, furnishing, repair, care, and maintenance of the said towboats and barges, the lessee shall furnish to the lessor and continue in effect during the period of the lease, and in case of sale until title passes to the purchaser, a good and suf-

ficient bond, approved by the lessor, in the penal sum of two hundred thousand (\$200,000) dollars.

“3. The net earnings above operating expenses and maintenance for each and every ton of cargo moved and all other net earnings shall be turned over by the lessee to the Secretary of War as soon as practicable after each proper determination of the amount thereof, but at least every ninety days, for deposit with the Treasurer of the United States to the credit of the Secretary of War in a special deposit account, and shall continue so to be turned over to him and so deposited by him until such time as said net earnings shall equal the full amount of the cost of the several vessels of the fleet plus interest on said cost at 4 per cent per annum computed from the respective dates of delivery of the several vessels of the fleet, and that thereafter all net earnings over and above the full amount of the said cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum, shall be deposited to the credit of the Secretary of War at least every ninety days by the lessee in one or more national banks in St. Louis, Missouri, to be designated by the lessor, to be held for the fulfillment of the terms of this lease, provided that earnings derived from the transportation of commodities in barges hereby leased, moved by towboats not furnished by the United States, shall, until all vessels of the Government fleet are delivered to the lessee, be subject to deduction of cost of the hire of the necessary towboats to move said barges, in addition to any other operating expenses and maintenance in connection therewith.

“ The lessee shall keep accurate detailed accounts of all tonnage moved and of all moneys received and

due and of all items of operating costs, and his accounts shall at all times be subject to inspection by the lessor or his representatives. The overhead expenses included in operating costs shall be subject to the approval of the lessor, and any items not approved by him and to which the lessee may object or take exception shall be referred to the Secretary of War, whose decision shall be final.

“ 4. The approved national banks shall be required to furnish good and sufficient bonds, approved by the lessor, in penal sum in amounts at least equal to the sum deposited conditioned for the safety of the funds held on deposit, as provided in this lease, said bonds to be delivered to the custody of the lessor and to be maintained during the period of the deposit. The said banks shall credit to the account interest at the local prevailing rates of non-checking accounts.

“ 5. Within three months prior to the expiration of the lease, or of any period of renewal, or sooner, if so desired by the lessee, a board of three persons shall be appointed, one to be designated by the lessor, one by the lessee, and one by the said two members, unless they shall fail to agree, in which case the third member, shall be appointed by the Secretary of War, all of whom shall be familiar with the construction and cost of river vessels of steel and with the current market values thereof, to appraise the value of the said fleet at that time, and the said lessee shall be given the option of purchasing the fleet upon the following terms:

“ (a) If the funds turned over to the Secretary of War and deposited by him with the Treasurer of the United States, under section 3 of this lease,

shall aggregate a sum equal to the full amount of the cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum as aforesaid, then in case of the exercise of said option by the lessee said funds shall be applied to payment in full for the fleet, and any net earnings over and above the amount required for such payment on deposit in said bank or banks, provided in section 3 of the lease, or otherwise held on deposit, shall be paid to the lessee.

“(b) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, under section 3 of this lease, shall be less than the full amount of the cost, plus accrued interest at the rate of 4 per cent per annum on such cost, but greater than the appraised value, the funds shall in said event be applied to payment of the fleet at the appraised value, and any amount in excess of the appraised value shall be retained by the Secretary of War for the use and benefit of the United States; and the fleet shall thereupon become the property of the lessee.

(c) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, as provided by section 3 of this lease, shall be less than the appraised value, then in the event aforesaid such funds shall be applied to the payment of the fleet so far as they shall reach, and the lessee shall pay in addition thereto, in the manner specified in section 6 hereof, the amount whereby the aggregate funds so turned over to the Secretary of War fall short of the said appraised value.

“6. It is further covenanted and agreed that the method of payment of any amount which the pur-

chaser shall be required to pay, and not provided for out of the sums deposited to the credit of the Secretary of War, shall be as follows:

“ There shall be sixteen (16) payments. The first shall consist of all moneys on deposit to the credit of the Secretary of War, as indicated above, and shall be so applied at the date of the sale. The lessee shall execute for the balance fifteen (15) promissory notes, in equal amount, payable at the expiration of one year, two years, three years, etc., from date of sale with interest at 4 per cent per annum. Title to the property shall remain in the United States until the payment of the whole of the purchase price of said property.

“ It is understood and agreed that the lessee assumes full responsibility for the safety of his employees, plant, and materials, and the said nineteen barges and three or four towboats, and for any damage or injury done by or to them and from any source or cause in the operation of the fleet.

“ 8. The lessor reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; and noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels.

“ 9. In the performance of the conditions of this lease, the employment of persons undergoing sentences of imprisonment at hard labor which have

been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction is prohibited.

" 10. No member or delegate to Congress or resident commissioner, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom; but under the provisions of section 116 of the Act of Congress approved March 4, 1909 (35 Stats. 1109), this stipulation, so far as it relates to members of or delegates to Congress or resident commissioners, shall not extend or be construed to extend to any contract made with an incorporated company for its general benefit.

" In witness whereof the parties aforesaid have hereunto placed their signatures of the date first hereinbefore written.

" WILLIAM M. BLACK, [SEAL.]

" *Major General, Chief of Engineers,*

" *U. S. Army (First Party.)*

" Witness:

" JOHN STEWART,

" *Lt. Col. of Engineers,*

" EDWARD F. GOLTRA, [SEAL.]

" *(Second Party.)*"

The entire contract is set forth above for the purpose of assisting in the determination of the two problems presented as above stated.

There was a supplementary contract entered into between the parties providing for loading and unloading facilities at the port of St. Louis, May 27, 1921. However, as this supplemental contract is in entire recognition of the former contract of

lease it does not in any respect modify its terms, and the same is not set forth.

The fleet of towboats and barges were completed and turned over to plaintiff as lessee under the contract about July 15, 1921. He continued to hold the same in possession until March 3, 1923, on which date the Honorable Secretary of War determined the terms and provisions of the lease had not been complied with by plaintiff and issued the order of that date, which reads as follows:

“WAR DEPARTMENT,

“*Washington, March 3, 1923.*

“E. F. GOLTRA, Esq.,

“*La Salle Building, St. Louis, Missouri.*

“SIR: Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract, in that you have failed to operate the said towboats and barges as a common carrier and in other particulars.

“I therefore declare the said contract and the supplement thereto terminated. You are hereby directed upon the receipt of this notice immediately to deliver possession of the said towboats and barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States, to Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service, who will deliver this notice, and who is

instructed and authorized to receive and receipt for the property herein mentioned.

"Yours very truly,

"JOHN W. WEEKS,

"*Secretary of War.*"

Plaintiff refusing to comply with this order, on March 22d thereafter, Acting Secretary of War, Mr. Davis, issued to Colonel T. Q. Ashburn, Chief of Inland and Coastwise Waterways Service, the following order:

"WAR DEPARTMENT,

"*Washington, March 22, 1923.*

"Colonel T. Q. ASHBURN,

"*Chief, Inland and Coastwise Waterways Service.*

"Colonel:

"1. You are hereby designated as the representative of the United States for the purpose of taking possession of the towboats and barges leased by the United States to Edward F. Goltra under a contract dated May 28, 1919.

"2. You will proceed to St. Louis, Missouri, Fayville, Illinois, and, if necessary, to Paducah, Kentucky, or elsewhere the said property may be found, and at once take possession of all of the said towboats and barges, or any number thereof that may be found.

"3. In taking such possession you are directed not to employ or use any action that will occasion strife, bodily force, or endanger the public peace.

"4. If physical resistance be offered to your taking such possession you are further directed to report that fact with all attending circumstances to me at once.

"(Signed)

DWIGHT F. DAVIS,

"*Acting Secretary of War.*"

In pursuance of this order Colonel Ashburn proceeded to St. Louis, took possession of said fleet of towboats, barges, and also the loading and unloading facilities built at the port of St. Louis.

Thereupon, plaintiff filed his bill of complaint. A temporary restraining order, mandatory in form, was issued, followed by the making and entry of the temporary mandatory injunction appealed from and sought to be reviewed in this case. This reads as follows:

“This cause coming on to be heard for a temporary restraining and mandatory injunction at the March Term, 1924, of the said Court, upon plaintiff's bill of complaint, the returns of the defendants heretofore filed herein and upon the evidence adduced by plaintiff and by the defendants, and the Court having considered the same, doth find that plaintiff herein, Edward F. Goltra, is entitled to the relief therein prayed for and it is therefore ordered that a temporary injunction be and is hereby granted plaintiff against the said defendants, Honorable John W. Weeks, Secretary of War of the United States; Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States; and James E. Carroll, United States District Attorney, their agents and servants, and anyone acting by or through or for them, restraining them or either of them from in any way interfering with the possession of the plaintiff of said boats and barges and other facilities and appliances of transportation in said bill of complaint described and from taking any of same from his possession, until the further order of this Court; and it is further

"Ordered, that said defendants, their agents and servants, and all those acting by or through or for them be and hereby are commanded and ordered forthwith to restore to the plaintiff herein at the port of St. Louis, Missouri, all of said towboats, barges, and other facilities and appliances heretofore seized by said defendants, subject to an accounting to be had for any damage resulting from the use and possession of the said boats, barges, tools, and appliances since the taking. It is further

"Ordered, that plaintiff forthwith give a penal bond in the sum of twenty-five thousand dollars (\$25,000)

"and

"That said temporary restraining and mandatory injunction remain in full force and effect until final hearing of this cause and until further order of this court.

"(Signed) C. B. FARIS, *Judge.*"

Does this record show this to be a suit in which the Government is in legal effect the real party defendant in interest? If so, as it is not in fact or name defendant, it is self-evident the suit can not proceed in the absence of a real party in interest to the record.

This is the first question raised on this record. It is the contention of plaintiff his suit is against the officers of the Government in name only, attempting without right or warrant of law to despoil him of his property rights under the lease by acts done under mere color or cloak of their office, and for this reason the suit is not one, in any just sense, against the government itself but is one against officials of the Government in name only attempt-

ing to commit and private trespass under color of their official positions; therefore, they are in the courts of our country amenable to him not as officials of the Government, but as mere individuals engaged in trespassing upon his private rights of property, and the case of the *United States vs. Lee*, 106 U. S. 196, and kindred cases, are relied upon and were apparently followed by the court below.

On the contrary, it is the contention of defendants, the government and the Government alone is the real party in interest in this litigation. That the property transferred to plaintiff under the terms of the written contract in suit was the sole property of the Government, contracted to be constructed for the Government by the Government and paid for by the Government out of its own funds. That the contract in dispute, as appears on its face, is a contract made by the Government under direction of the Secretary of War with plaintiff in the true sense and in its legal meaning of terms therein employed. That plaintiff having contracted with the Government in express terms for the lease, use, and possession of the fleet property and loading facilities, he is and of right ought to be estopped to deny the title of the Government and that it is the real party in interest, and from contending defendants, as officers of the United States in name only, and under color of their office, are in fact acting without and beyond the scope of their authority, and were threatening to do and doing him a private wrong and injury.

From a reading and examination of this record there can be no doubt whatever but that the fleet

and facilities the subject matter of the controversy was created by the government at its sole and only proper expense and absolutely belongs to the government, and did so belong at all times covered by this suit. That plaintiff knew and recognized this fact in the making of the contract of lease on which he relies for recovery in this suit, and as by the terms of this contract of lease he acknowledges title to the property by him received in the government he should now be estopped from contending to the contrary. The very language of the contract is plain, direct, and unequivocal on this head and is incapable of misunderstanding in this regard. It reads, in describing the parties to it, as follows:

“This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as the lessee.”

Again:

“Whereas the United States Shipping Board Emergency Fleet Corporation, allotted to the Chief of Engineers the sum of \$3,860,000 for the construction of a fleet of towboats and barges for the primary purpose of transporting the said iron and coal to and from St. Louis, Missouri; and

“Whereas, on the first day of August, 1918, the United States of America entered into contracts for the construction of nineteen barges suitable to

use for the transportation of said iron ore and coal ;
and

“ Whereas the United States of America is about to construct by contract or otherwise a fleet of tow-boats for the purpose of towing the said barges, the construction of which in the opinion of the Secretary of War is necessary to enable the government to dispose of the said barges more advantageously,” &c.

This contract also contains a further provision that all salvage earned by the fleet in operation after deducting expenses incident thereto and seamen's proportion, shall go to the government. In other words, it is not possible for the minds of reasonable men to disagree the subject-matter of the litigation is the sole and single property of the government. That the officials of the government named in the suit have no private interest or liability whatever in the matter, but in what they did acted as officials of the government for the government as their principal, under the law, can not be doubted. In such case there can be no escape from the legal conclusion the suit is, as any suit for like purpose must be, in fact against the government in its legal effect, and that unless the government shall enter its appearance no decree as prayed in the bill of complaint may enter.

To this conclusion, under the facts of this case, come all the well considered authorities on this important subject. A reading and consideration of these authorities controlling here will disclose the cases generally to fall under a few distinct classifications and to be governed by well-settled rules. In some of the adjudicated cases in which the plea has been interposed that the suit is in legal effect

though not in name against the Sovereign, where this plea has been denied will be found to have been based upon the ground that the truth or falsity of the claim made creates a justiciable controversy, and on the hearing the court, on the facts, found the asserted claim not established. Thus, in the celebrated case of *U. S. vs. Lee*, supra, claim was asserted by the officials of the government, Strong and Kaufman, that the suit was in legal effect one against the United States, and that they were merely acting as officials of the government in dealing with the property of the United States. However, the court on a hearing and examination of the facts denied this plea, for at the trial it was found as a fact the property in dispute was the property of Lee, and not the property of the United States, and that the officers of the United States attempting to deal with the property, while they were such officials of the United States as they claimed to be, yet they were not dealing with property of the United States but with the property of Lee to his injury. The reason why immunity was denied in that case is very clearly stated by Mr. Justice Miller, as follows:

“The case before us is a suit against Strong and Kaufman, as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; * * * *but it certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual must arrest the proceedings of the court, and prevent their looking into the suggestion and examining the validity of the*

title. * * * In this case, as in that (*U. S. v. Peters*, 5 Cranch. 115), after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States."

In other words, in cases of the character of *Lee v. United States*, the claim of immunity rests upon the particular facts of the case and the facts must be examined by the court in which the plea is presented, and if it be found the plea is not well founded in fact, must be denied.

Another class of cases in which the claim of immunity from suit on the ground it is in legal effect one against the Sovereign without its consent will be found to be cases brought against parties claiming to have acted or to be acting in their official capacities under and by virtue of some provision of statutory law, but which on the hearing of the case it is determined, as a matter of law, the statutory power on which the claimed officials relied for their office is held to be unconstitutional and void, hence conferred on them no office or no power or authority to act in the premises. The cases falling under this head are very numerous. *Osborn v. Bank of United States*, 9 Wheat. 738, 843, 868; *Davis v. Gray*, 16 Wall. 203; *Pennoy v. McConaughy*, 140 U. S. 1, 10; *Scott v. Donald*, 165 U. S. 107, 112; *Smyth v. Ames*, 169 U. S. 466; *Ex parte Young*, 209 U. S. 123, 159, 160; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146; *Herndon v. C. R. I & P. Ry. Co.*, 218 U. S. 135, 155; *Hopkins*

v. Clemson College, 211 U. S. 636, 643-645; *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94.

Still another class of cases in which immunity from suit is claimed and denied on the trial are cases in which actual officials of the government or state are proceeded against for the doing or threatening to do some act in which they claim the authority to so act under and by virtue of their office, but it is determined at the trial such officials were not in doing the act complained of within the scope of their authority as officials of the sovereign, but acting outside of any such official powers, their acts being *ultra vires*. Such was the case of *Philadelphia Co. v. Stimson*, 223 U. S. 607; *Lane v. Watts*, 234 U. S. 525; *Ballinger v. Frost*, 216 U. S. 240, and kindred cases.

As the title to the property involved in this controversy is concededly in the United States and plaintiff was a mere lessee, the rule in the case of the *United States v. Lee*, *supra*, and the like cases, have no application. That the Honorable Secretary of War was at the time an official of the United States and was acting for the United States in leasing and dealing with the property in question, there can be and is no possible denial. Therefore, the only contention left remaining is that arising under the third classification of cases above mentioned. That is to say, was his act in cancelling the lease and ordering the return of the property to the government *ultra vires* and void; or, as an official of the United States, and the head of the war department of the government was he acting within the scope of his power in declaring the lease contract made between the United States and plaintiff at an end?

The solution of this problem must depend upon the powers and duties of the Secretary of War as the head of the War Department of the government and the terms of the lease contract made between the government and plaintiff.

While it may be conceded had the lease contained no provision for reentry and retaking possession of the property, resort must have been had to some judicial tribunal in such case to ascertain and determine if conditions of the lease had been so broken as to terminate the lease. Again, if, on certain conditions specified in the lease, a right of cancellation and recovery of the property were stipulated, but without submitting the question of the happening or nonhappening of such conditions to the judgment or discretion of anyone, the question would again become one justiciable by the courts. Now, paragraph 8 of the contract of lease in question provides as follows:

“The *lessor* reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; *and noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor*, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels.”

Beyond all controversy, by simple plain language this provision of the lease reserved to the government the right, obligation, duty and power to cancel

and abrogate the lease if, in the judgment of the representative of the government vested with power to make the lease, the lessor, in his judgment, was not complying with any of the terms or conditions of the lease; for the government being an impersonal body or party to the contract, of necessity, it could not act except through its lawful representatives. This must have been and was well understood and known by the parties making the lease and that it would be exercised by the appropriate officials of the government in the enforcement of this and other provisions of the contract. The property involved in this controversy was under the control of the Department of War. The rentals of the property were required to be deposited to the credit of the Secretary of War; therefore, as the Secretary of War was the head of the department to which the involved property was consigned, it was under his direct and specific power and control to lease as is stated in the lease, and his judgment is the judgment to which paragraph 8 of the contract above quoted relates. So, just so certainly and surely as the decision of questions of dealings with the public domain of our country fall within the control of the Honorable Secretary of the Interior, it must be the property of the government constructed for preparations for war out of funds appropriated by Congress come under the control of the Secretary of War.

In this view of the case it must be held this is a suit against officials of the government in relation to property owned by the government and under their control as officials of government. Therefore, the plea of immunity from suit because in

legal effect against the government itself, in its sovereign capacity, should have been upheld and sustained.

As said by Mr. Justice Pitney, delivering the opinion of the court in *Wells v. Roper*, 246 U. S. 335:

“That the interests of the Government are so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party, although not named in the bill, is entirely plain. And the case does not fall within any of the exceptions to the general rule that the United States may not be sued without its consent, nor its executive agents subjected to the control of the courts respecting the performance of their official duties. It can not successfully be contended that any question of defendant’s official authority is involved; it is a mere question of action alleged to be inconsistent with the stipulation under which it purported to be taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of official discretion. And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of the argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States. See *Noble v. Union River Logging Railroad*, 147 U. S. 165, 171, and cases cited; *Belknap v. Schild*, 161 U. S. 10, 17, 18; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 108; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620.”

As has been seen, acting under the express terms of this contract expressed as clearly as words can express thought, intent or meaning of the writer, the Honorable Secretary of Interior considered and determined the question submitted to his judgment and gave his decision in favor of the reserved right of the government to cancel the contract.

In *Noble v. Union River Logging Railroad*, 147 U. S. 165, Mr. Justice Brown stated what that case involved, as follows:

"This case involves not only the power of this court to enjoin the Head of a Department, but the power of a Secretary of the Interior to annul the action of his predecessor, when such action operates to give effect to a grant of public lands to a railroad corporation.

"1. With regard to the judicial power in cases of this kind, it was held by this court as early as 1803, in the great case of *Marbury v. Madison*, 1 Cranch, 137, that there was a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial; that with respect to the former there exists, and can exist, no power to control the executive discretion, however erroneous its exercise may seem to have been, but with respect to ministerial duties an act or refusal to act is, or may become, the subject of review by the courts."

In *Marbury v. Madison*, 1 Cranch, 137, Mr. Chief Justice Marshall said:

"Where the head of a department acts in a case in which executive discretion is to be exercised; in which he is the mere organ of executive will, it is again repeated that any application to a court

to control in any respect his conduct would be rejected without hesitation."

In *Wells v. Roper*, *supra*, Mr. Justice Brown, delivering the opinion of the court, said:

"The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract and thus prevent the inauguration of the experimental service contemplated by the Act of 1914—a direct interference with one of the processes of government. The argument to the contrary assumes to treat defendant not as an official but as an individual who, although happening to hold public office, was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties. Indeed, it was only because of his official authority that plaintiff's interests were at all endangered by what he proposed to do."

In *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, Mr. Justice Peckham, delivering the opinion for the court, said:

"That the decision of the questions, presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his

determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make."

In the same case, it is said:

"Neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion. *Marquez v. Frisbie*, 101 U. S. 473; *Gaines v. Thompson*, 7 Wall. 347; *United States v. Black*, 128 U. S. 40; *United States v. Windom*, 137 U. S. 636."

In *Decatur v. Paulding*, 14 Pet. 497, Mr. Chief Justice Taney, delivering the opinion for the court, said:

"We have referred to these passages in the opinion given by the court in the case of *Kendall v. United States*, in order to show more clearly the distinction taken between a mere ministerial act, required to be done by the head of an executive department, and a duty imposed upon him in his official character as the head of such department, in which judgment and discretion are to be exercised * * *.

“ We are, therefore, of the opinion, that the circuit court were not authorized by law to issue the mandamus, and committed no error in refusing it. And as we have no jurisdiction over the acts of the secretary in this respect, we forbear to express any opinion upon the construction of the resolution in question.”

As the decision of the question of the right of the government to cancel the lease was left to the decision, judgment, and discretion of the parties to the lease, the question was withdrawn from the consideration of the courts of the country because it was one determinative of the executive will.

It follows, this suit being in its essential nature, though not in name, a suit involving the disposition of property of the United States, the United States in its sovereign capacity is the real party in interest as defendant, and being an indispensable party, no decree affecting its interests can go unless it is before the court. Therefore, the claim of immunity from suit on this ground should have been granted and its denial by the court was error.

Again, by the very terms of the contract in suit the right to cancel and annul the lease for non-compliance therewith by plaintiff was withdrawn from judicial power and was left to the judgment and discretion of the Honorable Secretary of War, the representative of the executive power of government. And, in taking jurisdiction and determining the controversy, as one of judicial inquiry in our courts, was also error.

It follows, the decree entered granting a temporary injunction must be reversed and the case

proceed no further unless the government shall consent to submit its rights under the lease to the court in place of the Honorable Secretary of War where the duty of deciding was placed by the parties to the contract.

Filed July 23, 1925.

SYMES, *District Judge*, concurring.

I desire to emphasize a little more fully certain features in the case that appear to me important.

The allegations of the bill are important to consider. It is alleged that the plaintiff Goltra had entered into arrangements with the Government during the war for the establishment of plants and transportation facilities to increase the output of iron ore, coal, etc., needed in the prosecution of the war. That the United States constructed the 19 barges involved in this suit, to be used for transportation of iron ore and coal—also necessary towboats. That the termination of the war made it unnecessary to carry out these plans, and negotiations were then had between the plaintiff, Goltra, and the duly authorized representatives of the United States for the disposition of the boats that resulted in the contract in controversy, which it is alleged was entered into between the plaintiff and the United States.

The contract is then set forth. It recites: That the United States of America is about to construct a fleet of towboats for the purpose of towing the barges. That it, as lessor, represented by certain officials charters the boats to the lessee for five years, to be operated as common carriers upon the Mississippi River; the lessor to regulate the rates to be charged, and the lessee, after paying operat-

ing expenses, maintenance, etc., shall deposit the net earnings in a depository, etc., all to the satisfaction and approval of the lessor. Paragraph 8 is important. It provides that the Government shall have the right of inspection at any time for the purpose of seeing that the lease is being fully performed, and when in the judgment of the lessor, noncompliance with any of the terms or conditions justify, it may, without notice, terminate the lease, and take the fleet back. It next alleges that a controversy arose with the Secretary of War over rates to be charged, and admits in effect that complainant did not, as agreed, operate the barges as common carriers, and pleads several excuses for his failure so to do; that John W. Weeks, as Secretary of War, notified lessee under date of March 3rd, that in his judgment the latter had not complied with the terms of the contract, in that he had failed to operate the towboats and barges as common carriers, and in other particulars, and he therefore declared the contracts terminated. It is alleged that the action of the Secretary of War in declaring the contract at an end was unlawful. It would seem, however, that a breach by complainant being admitted, this is nothing more than a legal conclusion, no facts being pleaded in support thereof. In short, the gravamen of the bill is that the Secretary of War exercised powers specifically given him by the contract.

At the hearing correspondence was introduced between Goltra and officials of the Government, in which the boats were referred to by plaintiff as the property of the United States, and Goltra

himself under date of April 18, 1922, refers to the contract as one with the United States.

The court below states that if the United States is the lessor and owner of the boats in controversy, then the plaintiff can not be heard to dispute its title, and the case must then be dealt with on the question of whether the court can afford any relief, unless the actual lessor is before the court. It comes to the conclusion that the funds with which these boats were built were transferred or loaned by the Emergency Fleet Corporation, and that therefore the legal title to the vessels was in it as trustee for the United States, although the custody and control was in the Secretary of War, and, further, that the United States was the beneficial owner and "both Congress and the United States dealt with these vessels as if the United States not only was the absolute owner of them, but had the legal title to them, also absolutely."

Sec. 201d of Title II of the Transportation Act of 1920 provides, in effect, that these boats shall be operated by the Secretary of War for the purpose of providing facilities for water carriage on the Mississippi River. Irrespective of who furnished the money, the United States of America, according to the allegations of the bill and the terms of the contract, constructed the barges and delivered possession of them to the lessee. Further, as the court below points out, the funds with which they were built, while technically they may have been furnished by the Emergency Fleet Corporation, were funds of the United States, appropriated by Congress for the purpose of building ships, and in possession of the Fleet

Corporation only to the extent that the latter was an instrumentality of the Government, and transferred by order of the President to the Chief of Engineers for the purpose of building these vessels.

But an inquiry into the source of the funds seems irrelevant on the question of title, in view of the plaintiff's admission that the Government built the boats, delivered them to him, exercised dominion over them, and that he acted at all times on the assumption that he was dealing with the United States as owner. It would therefore seem that plaintiff is estopped from denying that the United States is owner, subject only to such rights as he had as lessee. It may be that the contract put plaintiff at the mercy of the Secretary of War, but the court can not relieve him from a bad bargain. The agreement expressly vested in the Government, or the Secretary of War, the right in his discretion to terminate it for failure to perform. The courts can not control the exercise of such discretion, when the authority to do the act is not challenged. *Philadelphia Co. v. Stimson*, 223 U. S., is not in point. Justice Hughes there says, p. 620, that the complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The converse is true in the case at bar.

In *Noble v. The Union River Logging Co.*, 147 U. S. 165, the court at p. 171, citing *Marbury v. Madison*, states that no power exists to control executive discretion, no matter how erroneous its exercise may be. This case is in point here, as

this contract gave the Secretary of War the right to use his judgment in deciding whether there had been a breach or not, and the specific breach cited by him in his letter of March 3rd declaring the contract terminated, is admitted by the bill, and fully established by the evidence. There is neither allegation nor testimony that Goltra performed.

If we grant, as I think we must, that it was the Secretary of War's duty to exercise executive power and discretion generally over vessels built by the United States for war purposes, and which was specifically granted by the terms of this contract, then our inquiry is at an end.

The case at bar on the facts is similar to *Wells v. Roper*, 246 U. S. 335. The court said (p. 337):

"And the case does not fall within any of the exceptions to the general rule that the United States may not be sued without its consent, nor its executive agents subjected to the control of the courts respecting the performance of their official duties."

And p. 338:

"And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of the argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States."

That was a case where it was sought—as it is here—to prevent an officer of the Government from annulling a contract or from further interfering with its performance, and it was held that such a suit was one against the United States,

although it was not named as a party, and therefore could not be maintained.

Minnesota v. Hitchcock, 185 U. S. 373, and *In re Ayres*, 123 U. S. 443, show that the courts look at the whole record in deciding whether the United States is a real party or not and should decide the question whether it is so named or not. See also *Stanley v. Schwalby*, 162 U. S. 255.

U. S. v. Lee, 106 U. S. 196, is relied upon by appellees. But, as Mr. Justice Miller points out there, the United States went so far as to contend that, though it did not have any title to the land in controversy, and what it set upon as a title was no title at all, the court could not render judgment in favor of the plaintiff and against the defendants, because the latter held the property as officers of the United States. This argument was rejected by the court, because it being clear that the title to the property in question had always been in the plaintiffs, it followed that the acts of any Government officials in taking and holding possession was trespass pure and simple, and they could not avail themselves of the immunity of the United States from suit. Further, as the court said, it was not alleged, and could not be contended, that Congress or the President had any lawful authority to take possession of the property in question. See also *Belknap v. Schild*, 161 U. S. 11.

Sloan Shipyards v. U. S. Fleet Corp., 258 U. S. 549, is also relied upon by appellee. But it differs from the one at bar because the defendant, the Fleet Corporation, was held to be a separate entity, incorporated under the laws of the District of Columbia. The court found that the bill stated

a cause of action against the Corporation, because it could not be assumed from the allegations of the bill alone that the taking possession of the property in question by the Fleet Corporation was in pursuance of powers delegated to it by the President at the time that act occurred, or that it was included within the ratification of the past acts of the Fleet Corporation made by executive order.

In *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. at p. 184, the Supreme Court reiterates that the motive or mere abuse of discretion by a Government official in exerting a power given involves considerations that are beyond the reach of the judicial power, and that the judiciary may not invade the executive department for the purpose of correcting alleged mistakes or wrongs arising from an asserted abuse of discretion.

I can not find on this record that the government officials arbitrarily interfered with property of the plaintiff. The boats were not his property, and his limited right of possession was lost by his failure to operate them. Before they were seized there were negotiations between the parties, and he was notified that the Government would exercise its rights under the contract.

In conclusion, it must be remembered that the whole object of the United States in leasing these boats was to have them operated for the benefit of shippers in the Mississippi Valley; that Goltra attempted only two trips on the river and then tied them up at the wharf in St. Louis. The shipping public were complaining of the lack of service, so the Government then took possession

in order to turn them over to a lessee who would give service to the public.

It would therefore seem that the motion to dismiss and to quash the temporary restraining order should have been granted.

Filed July 23, 1925.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 718

EDWARD F. GOLTRA, PETITIONER

vs.

DWIGHT F. DAVIS, SECRETARY OF WAR OF THE United States, Successor to John W. Weeks, Secretary of War of the United States, Col. T. Q. Ashburn, Chief Inland & Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney, respondents

BRIEF OF RESPONDENTS

STATEMENT

On May 28, 1919, the contract in question was entered into. Its general features are set out in petitioner's statement, and it and the bill will be considered more in detail in the argument.

When the boats and barges which were the subject matter of the contract were delivered to Mr. Goltra on July 15, 1922, Mr. Weeks had become Secretary of War, and it became necessary for him as such to deal with this contract, with which,

in the making, he had had no part. Certain stipulations of the contract called for the exercise on his part of judgment and discretion. One in particular has been repeatedly mentioned in the bill of complaint and in the briefs of counsel. It is as follows:

2. (a) That the said lessee (Goltra) shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal, and other commodities at rates not in excess of the prevailing rail tariffs and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made, provided the Secretary of War consents to such use other than as a common carrier.

From this paragraph, it will be at once seen that the contract imposed upon the lessee the duty of operating the fleet as a common carrier under rates neither higher nor lower than the rail rates, unless the Secretary of War shall have consented to a different rate, or that it be operated other than as a common carrier.

On March 4, 1921, the Secretary of War, at the request of Mr. Goltra, and before the delivery of the fleet to him, authorized operation at 80% of the all-rail rates.

On May 6, 1922, also before the delivery of the fleet to Mr. Goltra, the Secretary of War wrote Mr. Goltra withdrawing the 80% rate with respect to future undertakings except as to such commodities as might thereafter be specified by him, but not withdrawing the rate as to undertakings already entered into, which had been mentioned in Mr. Goltra's letter of April 18, 1922.

On May 25, 1922, also before delivery, the Secretary gave permission for the handling at 80% of all-rail rates of the following commodities: liquids in bulk, including liquid asphalt or road oil, in drums; coal, lumber, sulphur, ties, cement, salt, sand, gravel, crushed rock; and grain above the capacity of the Mississippi-Warrior Service to handle such commodity. This letter gave permission to transport all commodities including grain, above St. Louis at the 80% rate.

After July 15, 1922, when the fleet was delivered to Mr. Goltra, only two small movements of one tow boat and several barges were had, one in August and the other in September, 1922.

It has been already noticed that the contract required the operation of the fleet as a common carrier.

Section 8 of the contract provided that non-compliance, in the judgment of the lessor, with any of the terms or conditions of the contract, would justify his terminating it and returning the fleet to the lessor.

On March 4, 1923, the Secretary served upon Mr. Goltra a notice dated March 3, 1923, terminating the contract for failure to operate the fleet as a common carrier and demanding possession of the fleet.

On March 8, 1923, Mr. Goltra wrote the Secretary, refusing to comply with his demand.

On March 25, 1923, acting under written instructions from the Assistant Secretary of War, Colonel Ashburn took possession of the fleet in the harbor of St. Louis; as we contend, without violence or show of force, but as complainant contends, otherwise. In our view of the law, the issue of this controversy is immaterial.

Colonel Ashburn in executing the executive judgment had the right to use all necessary force just as the Marshal (another executive officer) has such right in executing a judicial judgment.

At one of the preliminary hearings, complainant contended that the right to declare a forfeiture was, under the contract, with the Chief of Engineers, and not with the Secretary of War.

On April 30, 1923, a letter signed by the Chief of Engineers, dated April 27, 1923, declaring a forfeiture in similar terms to the Secretary's letter of March 3, 1923, was served upon Mr. Goltra. This letter was dated and served after the taking of possession of the fleet and after the institution of the suit, but is in the record at page 90, and is before the court. It is the contention of the defendants that the rights and status of the parties are

to be declared as of the date of the order of temporary injunction rather than at the time of the seizure or of the filing of the suit.

Much controversy has arisen between the parties as to who or what is the lessor under the rather vague and inharmonious language of the contract designating him. This, in our view, is of no moment, as it clearly appears that the United States was the owner of the fleet, and the contract was made in its behalf. Furthermore, the judgment of each of the officers whom the parties oppositely contend was vested with discretion to cancel the contract has been exercised to that end.

The defendants at every opportunity have urged that this suit is one the object of which is to specifically enforce a contract against the United States behind its back and is therefore, in effect and consequence, a suit against it; that it seeks to judicially review the exercise of the judgment and discretion of an executive officer, in a matter not merely ministerial, but one with respect to which he is vested with the power and duty to act at his discretion and according to his judgment.

It is the contention of the defendants that neither of these things may be done, and this view the majority opinion of the Court of Appeals sustains.

It is also contended that the bill is essentially one for specific performance of the contract, to which the substantial and only interested party, the United States, is not a party.

SUMMARY OF POINTS AND AUTHORITIES

I

The United States being the owner of the property and a party to the contract, no equitable relief can be had without the United States being a party.

Cunningham v. Railroad Company, 109 U. S. 446.

II

The suit is in legal effect a suit against the United States.

Wells v. Roper, 246 U. S. 335;
Hagood v. Southern, 117 U. S. 52;
In re Ayers, 123 U. S. 443;
Naganab v. Hitchcock, 202 U. S. 473;
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Belknap v. Schild, 161 U. S. 11;
New Mexico v. Lane, 243 U. S. 52;
Louisiana v. Garfield, 211 U. S. 70;
Leather v. White, 296 Fed. 477.

III

The suit seeks to interfere with the judgment and discretion of an executive official and to substitute therefor the judicial judgment.

Marbury v. Madison, 1 Cranch 170;
Noble v. Railroad, 147 U. S. 171;
Wells v. Roper, 246 U. S. 335;
U. S. v. Hitchcock, 190 U. S. 316.
U S v. Eckford & Wall. 484
U S v. Mc Lemme & How 289

IV

The second notice of forfeiture was admissible in evidence.

Clark v. Wooster, 119 U. S. 322;
Singer Mfg. Co. v. Wright, 141 U. S. 696;
Railroad v. Trans. Co., 155 U. S. 585;
Continental Sec. Co. v. Transit Co., 207 Fed. 467.

V

The nonuse of the property legally justified the forfeiture.

(a) Fraud or bad faith must be shown.

Kihlberg v. United States, 97 U. S. 398;
Sweeney v. United States, 109 U. S. 618;
Martinsburg & Potomac R. R. Co. v. March, 114 U. S. 549;
United States v. Gleason, 175 U. S. 588;
United States v. Mason & Hanger Co., 260 U. S. 323;
U. S. v. Henley, 182 Fed. 776;
Second Natl. Bank v. Pan-American Bridge Co., 183 Fed. 391.

VI

The Government was acting in its sovereign capacity.

North Am. Com. Co. v. U. S., 171 U. S. 110.

(a) The result would be no different if it were acting otherwise.

U. S. v. Bank of the Metropolis, 15 Pet. 392.

*Courts cannot decree specific performance
 against United States*

ARGUMENT

THE MERITS

The bill admits that the plaintiff did not perform his contract in accordance with its terms. Note the following allegation:

And the plaintiff therefore avers that by the acts of the said John W. Weeks, acting as Secretary of War, and other representatives of the War Department, the plaintiff was wrongfully deprived by the lessor in said contract from carrying out the terms and conditions of said contract as a private carrier or in any other manner provided by said contract; and it became and was impossible for the plaintiff to so carry out the contract under the terms and conditions thereof, unless and until the *lessor* therein, *being the United States*, causes and permits the plaintiff to carry out the conditions of said contract.

What were the acts of the Secretary of War which prevented the performance of the contract? It must be borne in mind that the contract gave to the Secretary the right to compel operation *at all rail rates*. Therefore, if he had done this, it could not be said that he had breached the contract. But he did not do this. Just what did he do? On May 4, 1921, the Secretary gave his consent generally to a rate which was 80% of all rail rates. On May 6, 1922, this general consent was withdrawn as to *future* engagements, and special

application required to be made for rates on specific commodities, followed on May 25, 1922, by expressly specifying an 80% rate on practically everything which the barges could suitably handle, except grain, which was permitted to be carried at this rate, but in limited amount on account of lack of elevator capacity at terminal points and other conditions at New Orleans. A rate of 80% on all commodities was permitted above St. Louis. All this was done before delivery of the boats. No engagements already entered into were affected by those orders. It is to be noted that, notwithstanding all this, none of the hundreds of thousands of barrels of oil which Mr. Goltra says in his letter of April 8, 1922, he had obligated himself to transport were ever moved, and no effort ever made to qualify as a common carrier. This was all the authority the Secretary of War ever exercised over the fleet, and this was the interference and non-cooperation of which the Secretary was guilty, when, by the very stipulation of the contract itself, he could have held the plaintiff, had he wished, to the all rail rates on all commodities. It must always be borne in mind that the operation of the boats was the prime consideration moving to the Government in the making of this contract. Without that, it could receive no payment for them; without that, the transportation service of which they were capable and for which there was such crying need, could not be rendered.

From all of this it follows that, forgetting for the moment the sovereign status of one of the parties to the contract, and looking at them all as individuals only, there is no ground for either legal or equitable relief. Plaintiff solemnly admits in the bill itself nonperformance of his contract. He undertakes to excuse it because the Secretary of War, while authorized to hold him to all rail rates on all commodities, gave him an 80% all rail rate on everything the barges were designed to carry limiting the amount of carriage of only one commodity to the capacity of the warehouses and terminals. Nonperformance being conceded, if the excuse fails, as under the incontrovertible facts it must fail, the plaintiff is the wrongdoer, instead of the aggrieved.

Forgetting again for the moment the fact that the forfeiture was declared by an executive officer in the performance of his duty and that this proceeding did not originate in the Court of Claims, and viewing the situation as though the controversy were between private individuals, in order for the petitioner to maintain his right to a judicial review of the propriety of the declaration of forfeiture, he must show bad faith or fraud.

There are a number of cases holding that where a contract authorizes an officer or agent of one party to make a determination of fact, in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, the determination of the of-

ficer or agent is conclusive. The rule has been applied in the following instances:

(1) In *Kihlberg v. United States*, 97 U. S. 398, to a determination of distances by the chief quartermaster of the district of New Mexico under a contract for transportation which provided:

Transportation to be paid in all cases according to the distance from the place of departure to that of delivery, the distance to be ascertained and fixed by the chief quartermaster of the district of New Mexico, and in no case to exceed the distance by the usual and customary route.

(2) In *Sweeney v. United States*, 109 U. S. 618, to a refusal of an agent of the United States to give a certificate under a contract which provided that payment for a wall was not to be made until some officer of the army, civil engineer, or other agent, to be designated by the United States, had certified after inspection that it was in all respects as contracted for.

(3) In *Martinsburg & Potomac R. R. Co. v. March*, 114 U. S. 549, to the absence of a certificate under a contract for the construction of a railroad which provided that whenever the contract should be completely performed on the part of the contractor, and the company's engineer should so certify, payment should be made. In this case the defendant asked the trial court to charge the jury that the final estimate of the engineer was to be taken as conclusive, unless it appeared from the

evidence that, in respect thereto, he was guilty of fraud or intentional misconduct. The trial court modified this by adding after the words " fraud or intentional misconduct " the words " or gross mistake." The Supreme Court said:

This modification was well calculated to mislead the jury, for they were not informed that the mistake must have been so gross, or of such a nature, as necessarily implied bad faith upon the part of the engineer.

(4) In *United States v. Gleason*, 175 U. S. 588, to a refusal of an engineer in charge of certain work to grant an extension of time within which to perform the work under a contract made by the United States, through an officer of engineers, which provided that if the contractor should be prevented by freshet, ice or other force or violence of the elements from commencing or completing the work, such extension might be granted as in the judgment of the officer who made the contract or his successor should be just and reasonable.

(5) In *United States v. Mason & Hanger Co.*, 260 U. S. 323, to a decision of a contracting officer that a premium on a bond was an expenditure in the performance of work under a cost plus contract, for which the contractor should be reimbursed; the contract providing that the contractor should be reimbursed for such of its actual net expenditures in the performance of the work as might be approved or ratified by the contracting officer.

U. S. v. Henley (C. C. A. 8th Cir.), 182 Fed. 776, was an action to recover from the United States money conceded to be due. The United States set up a counterclaim for money paid on a certificate of an army officer authorized to supervise the performance of a contract, and whose decision as to performance was made final, alleging that the officer "carelessly, negligently, and wrongfully" permitted the plaintiff to do various things contrary to the contract, and to omit others provided for therein, and approved the work and certified that it had been duly performed, thereby misleading its other officers and agents, and inducing them to accept what had been done and to pay the full contract price. The court held that a demurrer to the counterclaim was properly sustained, since it was not alleged by the United States that the certificate of the officer in charge was the result of fraud or such gross mistake as would imply fraud or a failure to exercise an honest judgment.

In *Second National Bank v. Pan-American Bridge Co.* 183 Fed. 391 (C. C. A. 6th Cir.), payment under a contract was to be made on the certificate of an architect. The court held that it was error to instruct the jury that recovery could be had without the certificate if the certificate were withheld "unreasonably and unfairly;" that there must be bad faith to dispense with the necessity for the certificate.

Certainly nothing in this record bespeaks bad faith or fraud.

It will be noted that the above cases in which the United States was a party and in which judicial review was had of actions of ministerial officers originated in the Court of Claims, where legal principles of substantive law applicable as between individuals is to be applied to Government officers. It is our view that this does not militate against the contention hereinafter made that there can be no such judicial review of the exercise of judgment and discretion by such officers within their proper sphere of action in other Courts of the United States than in the Court of Claims, for the reason that the United States has consented to be sued in the Court of Claims, but not elsewhere.

THE SUIT IS AGAINST THE UNITED STATES

Aside from the proposition that on the merits of the bill and on the evidence the complainant is entitled to no equitable or other relief, there arise on his record two questions of so kindred a nature, that they were best argued together.

First, that the suit is in effect and consequence, although not nominally, one against the United States.

Second, that the suit is one to enjoin executive officials of the United States from exercising a right and power within their proper sphere of action, which involve the exercise of judgment and discretion, and to substitute therefor, the judgment and discretion of the Court.

It is contended by the petitioner that this proceeding is simply one to preserve the status created by the contract, or for "maintaining and restoring the private rights and property rights under an executed contract." Just what sort of a proceeding that would be it is difficult to understand. Certain it is that this is an equitable proceeding and not one at law. Certain it is that aside from Mr. Goltra's interest, all of the interest and rights with respect to the property in question are those of the United States and not of the defendant officials. Any adjudication of rights with respect to the property must be against the United States, which is both the owner and the other party to the contract.

The prayer of the bill is a prayer for specific performance of the contract. It asks a restraining order without notice enjoining the defendants from interfering with the possession by the complainant of the boats and barges, commanding them to return those taken and restraining the defendant, Secretary of War, "*from doing any act whatever looking to the cancellation or other termination of said contract,*" concluding with the following:

The plaintiff prays that on final hearing of this cause of action, a decree may be entered in favor of plaintiff and against the defendants and each of them, *which shall determine the rights of the plaintiff as herein set forth* under said contracts and perpetually enjoin and restrain the said defendants from interfering in any way with said rights.

This is undoubtedly a prayer for specific performance. The preliminary relief is only incidental to the final decree of performance.

Dealing with an equitable proceeding of a similar nature, this Court in *Cunningham v. R. R. Co.*, 109 U. S. 446, said:

In actions of law, of which mandamus is one, where an individual is sued, as for injuries to person or to property, real or personal, or in regard to a duty which he is personally bound to perform, the Government does not stand behind him to defend him. If he has the authority of law to sustain him in what he has done, like any other defendant, he must show it to the Court and abide the result. In either case the state is not bound by the judgment of the Court, and generally its rights remain unaffected. It is no answer for the defendant to say I am an officer of the Government and acted under its authority, unless he shows the sufficiency of that authority. Courts of equity proceed upon different principles in regard to parties. As was said in *Barney v. Baltimore*, 6 Wall. 280, there are persons who are merely formal parties without real interest, and those who have an interest in the suit, but which will not be injured by the relief sought, and there are those whose interest in the subject matter of the suit renders them *indispensable* as parties to it. Of this latter class the Court said, in *Shields v. Barrow*, 17 How. 130:

"They are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest, or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience."

"In such case," says the Court in *Barney v. Baltimore*, 6 Wall. 280, "the Court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

In the case now under consideration, the State of Georgia is an indispensable party. It is, in fact, the only proper defendant in the case. No one sued has any personal interest in the matter, or any official authority to grant the relief asked.

On this authority, the presence of the United States is indispensable to final relief. For this reason alone, the suit must fail.

A suit to specifically perform a contract of the United States brought against its officers is a suit against it, and this bill is in legal effect one to specifically enforce the contract set forth therein, and to restrain the exercise by the opposite party, the United States, from exercising the contractual right to terminate the contract for complainant's failure to perform the very service primarily contemplated by the contract of lease on the ground that the conditions justifying its termination did not exist, inasmuch as the lessee's failure to per-

form was occasioned by alleged acts of noncooperation or frustration on the part of the United States. In other words, the bill proceeds upon the theory not that the *right* to declare the contract terminated did not exist at all, but that a state of facts from which the right might arise did not exist, as had been so determined by the Secretary of War, thereby challenging the soundness and propriety of the conclusions of the Secretary of War in the exercise of his discretion and judgment upon questions of fact. The final decree, if one should be passed in this cause, would be to declare the right of plaintiff to the avails of the contract; that is, the possession and the right to operate the boats, and to restrain the defendants on behalf of the United States from declaring a forfeiture of said contract and retaking possession of the boats, as provided by the terms of the contract. Such an adjudication would clearly involve a determination of both questions of law and fact which vitally affect the rights and property of the United States and which could not be determined without the presence of the United States as a party defendant.

In *Hagood v. Southern*, 117 U. S. 52, the State of South Carolina issued bonds which provided that they should be receivable in payment of taxes. It was also provided in the act authorizing the issuance of these bonds that an annual tax of three mills for every dollar of taxable property should be levied to secure the redemption of such bonds.

Subsequently, the state repealed the act for the levy of a tax of three mills for the redemption of such bonds and enacted a statute providing that such bonds should not be receivable in payment of taxes. The plaintiffs as owners of these bonds thereupon instituted suit against defendants as officials of the state to compel them to levy the three-mill tax for the redemption of these bonds and to accept the same in payment of taxes. The Court held that the suit could not be maintained because it was, in effect, a suit against the State of South Carolina, which had not given its consent to be sued.

The Court said (l. c. 67) :

These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it chooses, and, except with that consent, it could not be brought before the Court and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and

agents of the state, having no personal interest in the subject matter of the suit, and defending only as representing the state. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the state. The state is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States.

And in *In re Ayers*, 123 U. S. 443, the Court, in holding that a suit brought by the holders of certain bonds issued by the State of Virginia, which provided that the coupons thereto would be accepted in payment of taxes, to enjoin the Attorney General and other officials of that state from instituting suits to enforce the collection of taxes against plaintiff, who had tendered such coupons in payment of the taxes, was a suit against the State of Virginia and could not be maintained, said:

A bill in equity for the specific performance of contract against the state by name, it is admitted, could not be brought. In *Hagood v. Southern*, 117 U. S. 52, it was decided that in such a bill, where the state was not nominally a party to the record, brought against its officers and agents, having no

personal interest in the subject matter of the suit, and defending only as representing the state, where "the things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the state," the Court was without jurisdiction, because it was a suit against the state.

The converse of that proposition must be equally true, because it is contained in it; that is, a bill, the object of which is by injunction, indirectly to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the state. In such a case, though the state be not nominally a party to the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the state.

In *Naganab v. Hitchcock*, 202 U. S. 473, the plaintiff, a member of the Chippewa Indian Tribe, brought suit to enjoin the defendant Hitchcock, Secretary of the Interior, from carrying out the provisions of an act for the disposition of certain pine lands ceded by the Indians of Minnesota to the United States, to be administered for their benefit. The Court held that as the title to the lands in question was in the United States the suit was

against the United States, which could not be sued without its consent. The Court said:

In this case, as in the *Oregon case* (202 U. S. 60), the legal title to all the tracts of land in question is still in the Government, and the United States, the real party in interest herein, has not waived in any manner or consented to be sued concerning the lands in question, and there is no act of Congress in anywise authorizing this action. Upon the authority of the *Oregon case* we hold that there is no jurisdiction to maintain the present suit * * *.

And under a similar state of facts the Court in *Minnesota v. Hitchcock*, 185 U. S. 373, 387, said:

Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the state. If whether a suit is one against a state is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.

In *Stanley v. Schwalby*, 162 U. S. 255, the plaintiff brought an action in trespass to try title to certain land occupied by the defendants as officers of the United States. The record title to the property in question was in the United States in fee simple. The plaintiff claimed title to an undivided one-third of this land by virtue of a prior unrecorded deed from the original owner, of which he claimed the United States had knowledge when it purchased the property. The Court held that as the record title to this land was in the United States the suit, although nominally against the officials of the United States, was in reality against the United States, and could not be maintained without its consent. The Court said:

The judgments of the courts of the State of Texas appear to have been largely based on *United States v. Lee* (106 U. S. 196), above cited. In that case, an action of ejectment was brought in the Circuit Court of the United States against officers occupying in behalf of the United States lands used for a military station and a national cemetery. The Attorney General filed a suggestion of these facts and insisted that the Court had no jurisdiction. The plaintiffs produced sufficient evidence of their title and possession, and the United States proved no valid title. The Court held that the officers were trespassers and liable to the action, and therefore affirmed the judgment below, which, as appears by the record

of that case, was simply a judgment that the plaintiffs recover against the individual defendants the possession of the lands described, and costs. And this Court directly recognized that, if the title of the United States were good, it would be a justification of the defendants; that the United States could not be sued directly by original process as defendant, except by virtue of an express act of Congress, and that the United States would not be bound or concluded by the judgment against their officers (106 U. S. 199, 206, 222) * * *.

In the case at bar, the United States, and their officers in their behalf, claimed title in the whole land. The plaintiffs claimed title in one undivided third part only * * *. Such being the state of the case, the final judgment in favor of the plaintiffs for the third part awarded to them, and for possession of the whole jointly with the individual defendants, was directly against the United States and against their property, and not merely against their officers.

In *Goldberg v. Daniels*, 231 U. S. 218, the cruiser *Boston*, belonging to the United States, had been condemned and advertised for sale by the Secretary of the Navy to the highest bidder. The plaintiff, claiming to be the biggest bidder for this boat, brought suit to compel the defendant, as Secretary of the Navy, to deliver the boat to him. The Court held that as the boat in question was the property

of the United States the suit was against the United States and could not be maintained because the United States had not consented to be sued. The Court said:

The United States is the owner in possession of the vessel. It can not be interfered with behind its back, and as it can not be made a party this suit must fail. (*Belknap v. Schild*, 161 U. S. 10; *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 606; *Oregon v. Hitchcock*, 202 U. S. 473, 476.)

In *Belknap v. Schild*, 161 U. S. 11, the plaintiff, as the owner of a patent for a caisson gate, brought suit against the defendants, officials of the United States, to enjoin them from using a caisson gate located in a navy yard belonging to the United States and for damages on the ground that the gate in question was an infringement of plaintiff's patent. The Court held that in so far as the defendants had themselves infringed plaintiff's patent rights the suit was not against the United States, but against the defendants personally. It was held, however, that as the gate in question was the property of the United States the suit, in so far as it sought to enjoin the use of said gate by the defendant officers, was a suit against the United States and could not be maintained. The Court said:

In the present case the caisson gate was a part of the dry dock in a navy yard of the United States, was constructed and put in

place by the United States, and was the property of the United States and held and used by the United States for the public benefit. If the gate was made in infringement of plaintiff's patent, that did not prevent the title to the gate from vesting in the United States. The United States, then, had both the title and the possession of the property. The United States could not hold or use it, except through officers and agents. Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction and for the destruction of the gate in question, the defendants had no individual interest in the controversy; the entire interest adverse to plaintiff was the interest of the United States in property of which the United States had both the title and possession; the United States were the only real party against whom alone in fact the relief was asked and against whom the decree would effectively operate; the plaintiff sought to control the defendants in their official capacity and in the exercise of their official functions as representatives of the United States and thereby to defeat the use by the United States of property owned and used by the United States for the common defense and general welfare, and, therefore, the United States were an indispensable party to enable the Court, according to the rules which govern its procedure, to grant the

relief sought, and the suit could not be maintained without violating the principles affirmed in the long series of decisions of the Court above cited.

In *New Mexico v. Lane*, 243 U. S. 52, it was held that the State of New Mexico could not maintain a bill against the Secretary of the Interior and the Commissioner of the General Land Office to establish the state's asserted title in fee simple to certain lands, under the School Land Grant Act of June 21, 1908, and to restrain the Interior Department from disposing of such lands, when there is a question involved as to whether that statute constituted a grant of the lands in question, as this involved a question upon which the United States would have to be heard.

In *Louisiana v. Garfield*, 211 U. S. 70, it was held that a suit by the State of Louisiana against the Secretary of the Interior and the Commissioner of the General Land Office to establish its title under the Swamp Land Grant Act of March 2, 1849, to certain lands which were approved to the state by the Secretary of the Interior upon the manifest mistake of law that upon the abandonment of a military reservation, of which the lands formed a part, the lands fell within the terms of the grant, was a suit against the United States because it involved questions of both law and fact upon which the United States would have to be heard.

In *Leather v. White*, 296 Fed. 477 (C. C. A. 7th Cir.), the plaintiffs, as minority stockholders of a corporation known as the Speedway Park Association, brought suit to recover certain property of the corporation, which was alleged to have been misappropriated by the majority stockholders and transferred to the United States. One of the defendants, White, was in charge of the property as the representative of the United States. The Court held that the United States was an indispensable party to the suit, and that as it had not consented to be sued the bill must be dismissed. The Court said:

In view of the relief sought, the recovery of the land, the United States was an indispensable party. (*George v. Hart* (D. C.), 250 Fed. 802, *Belknap v. Schild*, 161 U. S. 10; *Cunningham v. Macon, etc., Ry. Co.*, 109 U. S. 446.) Without its consent, the United States could not be sued in such an action. (*Louisiana v. McAdoo*, 234 U. S. 627.) Where the real party in interest, an indispensable party, can not be brought before the Court, the bill must be dismissed.

The fact that the title to the boats and barges which are the subject of this controversy is in the United States establishes beyond question, under the foregoing decisions, that the United States is a necessary and indispensable party to this suit.

Furthermore, the contract which is the basis of this action expressly reserved to the United States,

as the lessor of these boats and barges, the right to cancel the contract and retake these boats in the event of plaintiff's failure to comply with the requirements of the contract on his part to be performed. One of those requirements was that the plaintiff should operate as a common carrier. This, in the judgment of the United States, acting through its duly authorized officers, the Secretary of War and the Chief of Engineers of the United States Army, the plaintiff failed to do, and, accordingly, the United States, acting through those officers, notified plaintiff of the cancellation of said contract and demanded the return of said boats and barges. If the contract was rightfully terminated for plaintiff's failure to comply with its requirements in this respect, then it is or must be conceded that plaintiff was not thereafter entitled to retain them. It may be stated in this connection that the complainant introduced no testimony at the hearing of the application for a temporary injunction that he had complied with the requirements of the contract in this respect. On the contrary, it was established by the testimony of plaintiff's own witnesses at that hearing that during the period intervening between the time that plaintiff acquired possession of these boats and barges, July 15, 1922, and the institution of this suit, March 25, 1923, the plaintiff had only engaged in two operations; the first, a trip from Caseyville, Kentucky, to Crystal City, Missouri, involving the transpor-

tation of 4,000 tons of coal, and the other, from Hannibal, Missouri, to St. Louis, Missouri, involving the transportation of 4,000 tons of coal. (R. p. 70.) It would seem, upon such a showing, that the court below should have denied, instead of having granted, the temporary injunction.

Be that as it may, however, it is our insistence that the United States, acting through its duly authorized officials, had the sole and exclusive right to determine whether or not the complainant had complied with the requirements of the contract in this respect, and the District Court could not substitute its judgment for that of the United States in determining whether or not there had been a compliance with the terms of the contract by the complainant in this regard.

In *Marbury v. Madison*, 1 Cranch, 1 c. 170, it is said:

Where the head of a department acts in a case in which executive discretion is to be exercised, in which he is the mere organ of executive will, it is again repeated that any application to a court to control in any respect his conduct should be rejected without hesitation.

In *Noble v. Railroad*, 147 U. S. 171, referring to the decision in *Marbury v. Madison*, it is said:

That there was a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial; that, with respect to the former, there exists,

and can exist, no power to control the executive discretion, *however erroneous its exercise may seem to have been*, but with respect to ministerial duties, an act or refusal to act is or may become the subject of review by the courts.

In *Wells v. Roper*, 246 U. S. 335, the plaintiff had entered into and embarked upon the performance of a contract with the Post Office Department whereby he agreed to furnish automobiles for a period of four years for use in collecting and delivering the mail at Washington, D. C. Two years before the expiration of the term of this contract, and after plaintiff had expended considerable money and incurred substantial obligations in providing the necessary automobiles and equipment for the performance of this contract on his part, the Post Office Department determined that it would purchase its own automobiles and operate this service for itself. The plaintiff was thereupon notified of the termination of this contract under a clause thereof which provided that the Postmaster General could terminate the contract on ninety days' notice. Suit was instituted by plaintiff to restrain the defendant, First Assistant Postmaster General, from annulling this contract and from interfering with the plaintiff's performance of the same. The Court held that the suit was against the United States and could not be maintained. The case is so like the case at bar that we

deem it appropriate to quote at length from the pertinent expressions of the Court upon the question here under consideration:

The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract and thus prevent the inauguration of the experimental service contemplated by the Act of 1914—a direct interference with one of the processes of government. The argument to the contrary assumes to treat defendant not as an official but as an individual, who, although happening to hold public office, was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties. Indeed, it was only because of his official authority that plaintiff's interests were at all endangered by what he proposed to do.

That the interests of the Government are so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party, although not named in the bill, is entirely plain.

In dealing with the question of the right of the Court to review the exercise of the judgment and discretion conferred upon the Postmaster General by the contract, with respect to its termination, the Court says:

And the case does not fall within any of the exceptions to the general rule that the United States may not be sued without its consent, nor its executive agents subjected to the control of the courts respecting the performance of their official duties. It can not successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged to be inconsistent with the stipulation under which it is purported to be taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of official discretion. And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States. (See *Noble v. Union River Logging Railroad*, 147 U. S. 165, 171, and cases cited; *Belknap v. Schild*, 161 U. S. 10, 17, 18; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 108; *Philadelphia Co. v. Stimpson*, 223 U. S. 605, 620.)

The United States has consented to be sued in the Court of Claims and in the District Courts upon claims of a certain class, and not otherwise. Hence, without considering other questions discussed by the courts

below or raised by appellant in this court, we conclude that the dismissal of the bill was not erroneous.

In *Board of Liquidation v. McComb*, 92 U. S. 531, it was said:

A State, without its consent, can not be sued by an individual, and a court can not substitute its own judgment for that of an executive officer in matters belonging to the proper jurisdiction of the latter.

In *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, one Clarke relinquished and deeded to the United States certain forestry lands and in lieu thereof selected certain agricultural lands owned by the Government. After such selection the local registrar certified that there were no adverse claims to the land thus selected in lieu of the land relinquished to the United States. Later, however, the Kern Oil Company protested this selection, and acting upon such protest, the Secretary of the Interior declined to issue letters patent therefor to plaintiff, which had purchased Clarke's interest therein. The plaintiff thereupon applied for a writ of mandamus to compel the defendant, as Secretary of the Interior, to issue letters patent to plaintiff for said land, averring that the protest to such selection by the Kern Oil Company was insufficient to constitute an issue as to whether or not the land so selected by Clarke was open to settlement, and that the recognition of such protest by the defendant was arbitrary and

unjustified. The Court held, however, that it had no power or authority to review the action of the defendant in rejecting Clarke's selection of lands, saying:

Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The Court has no general supervisory power over the officers of the Land Department by which to control their decisions upon questions within their jurisdiction. If this writ were granted, we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. * * * The responsibility as well as the power rests with the Secretary, uncontrolled by the courts.

So in this case the Secretary of War having determined that the complainant had failed to operate these boats and barges as a common carrier, as required by the terms of the contract, and having elected to cancel and terminate the contract as a result thereof, his action in so doing is final and

is not subject to review by the courts. This being so, the plaintiff was not entitled to the possession of these boats following such cancellation and the defendants were rightfully entitled to retake the same. Suppose the United States had converted one of its war vessels into a merchant vessel and leased the same to plaintiff for a period of five years, with the right to retake possession of the same before the expiration of the contract period if the exigency of war required it? Would the United States, in the event of plaintiff's refusal to return said vessel before the expiration of the contract period, be required to proceed through the courts and to show to the satisfaction of the Court that the exigency of an impending war required the return of such vessel before it would rightfully acquire possession thereof? We think not.

I

Due processes of law

Much has been stated in the various briefs filed by petitioner and in oral arguments to the effect that the seizure of the boats deprived the petitioner of his property without due process of law.

If the contract had given no right to retake the boats there might be something to this contention, but the authority which gave to the petitioner whatever rights he obtained reserved the power to terminate his rights under certain conditions. The

declaration of forfeiture and the taking of the boats was the result of this reservation.

We contend that the evidence amply justifies the forfeiture and seizure for actual legal cause, to wit, nonuse. However, be that as it may, the power of determination with respect to that matter resided in the executive official of the Government and his determination of that mixed question of law and fact is, in our opinion, conclusive upon all persons, and undoubtedly so in the absence of fraud or bad faith, which is not shown.

It makes no difference which of the executives had the power to make the finding resulting in forfeiture. Both the executive head of the department and his subordinate made the finding.

Colonel Ashburn simply executed the orders of his superior officer, and in our view the minor executive officer, in his proper sphere of action, exercises the plenary power of the executive department, and is no more subject to the restraints of judicial process than the executive head of the department.

Where the executive power has pronounced its finding or judgment within its proper sphere of action, a judicial judgment is not necessary to the enforcement of the executive one, for the reason that all the compulsive power of the Government is in the Executive Department and may be exercised by it in execution of its own processes and judgment, just as it is exercised by it in the execution of judicial processes and judgment.

Lacking the necessity for judicial confirmation of an executive finding, there is certainly no necessity or reason for an appeal to the judiciary for the execution of the executive finding, for the execution of process, judicial or otherwise, is an executive function.

Due process of law is not necessarily judicial in its nature. Whatever is done by a duly constituted authority in its proper sphere of action is due process of law. (*Meyer v. Peabody*, 212 U. S. 78, 84; *U. S. v. Ju Toy*, 198 U. S. 253, 263.)

Government acting in a commercial capacity

It has been contended that in making the lease the Government was acting in a commercial and not in a sovereign capacity. In *North American Com. Co. v. U. S.*, 171 U. S. 110, an action to recover rent under a lease of seal fisheries, the same claim was made. The Court said:

The seal fisheries of the Pribilof Islands were a branch of commerce, and their regulation involved the exercise of power as a sovereign, and not as a mere proprietor.

But even if the United States were acting in a commercial capacity, the result would not be different.

It may be true that when the United States enters into a commercial transaction its liability in connection therewith is to be determined in accordance with the rules of substantive law which apply in the case of individuals. But the immunity of the

United States from being sued without its consent applies as well to suits to enforce that liability as to any other suits. (*U. S. v. Bank of The Metropolis*, 15 Pet. 392.)

The creation of the Court of Claims with jurisdiction to determine contract claims against the United States is evidence that the United States could not otherwise be sued upon commercial transactions, as most, if not all, contract claims must arise from commercial rather than governmental transactions.

We believe that no case gives support to the proposition that the determination of the question whether a suit against officers of the United States is really one against the United States is dependent upon whether the transaction involved is a commercial or governmental one. *Sloan Shipyards v. U. S. Fleet Corp.*, 238 U. S. 549, is certainly no such authority.

In the case of *Bank of United States v. Planters Bank of Georgia*, 9 Wheat. 904, it was simply decided that because the State happened to be a stockholder in the bank did not confer immunity from suit upon the bank. Of course, the stockholders of a corporation legally have no identity with the corporation itself.

In our view, whether the leasing of these boats was a commercial transaction or not, it certainly arose out of the exercise of sovereignty. The fleet had been constructed for the purpose of carrying

on war, which is one of the highest acts of sovereignty. One of the purposes of the Government is to promote commerce. This contract was entered into so that these otherwise useless instrumentalities might be of service to the public and aid in the development of one of the great waterways of the nation.

Petitioner has appended to his brief the opinion of District Judge Faris on the motion to dismiss the bill, in which he holds that indirectly this suit is one against the Fleet Corporation, for the reason that the money used to construct the boats and barges was primarily from money allotted by Congress to the Fleet Corporation. This contention is obviously without merit. The contract under which these boats were leased was made with the United States and recites that the United States is both the lessor and the owner thereof. It is a fundamental rule of law that a lessee can not dispute the title of the lessor. Furthermore, the money used for the construction of these boats was the property of the United States, and not of the Fleet Corporation. In fact, all of the money and property of the Fleet Corporation belonged to the United States and was merely held by the Fleet Corporation as agent for the United States for the construction of ships, shipyards, etc. This is manifest from a cursory examination of the Acts of Congress.

By the terms of the Shipping Act, approved September 7, 1916 (Comp. Stat. 8146b), the United States Shipping Board was created, to be composed of five commissioners appointed by the President. Under this Act the Shipping Board, with the President's approval, was authorized to construct and equip vessels for naval or military purposes. Under Section 11 (Comp. Stat. 8146b), the Shipping Board was authorized to form a corporation under the laws of the District of Columbia for the construction of merchant vessels in the commerce of the United States and on behalf of the United States. In accordance with the provisions of that section the United States Shipping Board Fleet Corporation was incorporated on April 17, 1917.

Under the Urgent Deficiencies Appropriation Act of June 15, 1917, c. 29, the President was authorized and empowered to place an order with any person for such ships and material as the necessities of the Government, to be determined by the President, should require during the period of the war. Under Section 4 of that Act, the President was given the power and authority to expend the sum appropriated, through such agency or agencies as he might determine from time to time. Under Section 12 of the same Act there was appropriated for the purposes as aforesaid the sum of \$250,000,000.

By an Executive order of July 11, 1917, the President, under the authority of Section 4 of the

Act of June 15, 1917, as aforesaid, directed that the United States Emergency Fleet Corporation should have and exercise all of the authority and power vested in him in the "emergency shipping fund," in so far as applicable to and in furtherance of the construction of vessels.

It is manifest, therefore, and the authorities so hold, that the Emergency Fleet Corporation was but the agency designated by the President for carrying out the powers conferred upon him in the construction of such ships and vessels as would be needed by the naval and military departments during the period of the war. While it is true that all contracts made by the Fleet Corporation for the construction of boats and vessels were contracts of that corporation and not of the United States, nevertheless, the money appropriated to the Fleet Corporation was the money of the United States and the vessels so purchased or constructed were the property of the United States and not of the Fleet Corporation. (*United States v. Carlin*, 259 Fed. 904; *United States v. Union Timber Products Co.*, 259 Fed. 907; *United States v. Walter*, 263 U. S. 15.)

Furthermore, the President, by Executive order dated March 12, 1919, withdrew from the United States Shipping Board Emergency Fleet Corporation that part of the power and authority vested in him by law with respect to the barges and tow-boats here in controversy and conferred the same

upon the Secretary of War "to be by him executed through contract or otherwise as in his judgment may be most economical and advantageous to the United States."

In the Transportation Act of 1920, Title 11, Section 201 (d), it is provided:

Any transportation facilities owned by the United States and included within any contract made by the United States for operation on the Mississippi River above St. Louis, the possession of which reverts to the United States at or before the expiration of such contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above St. Louis.

The facilities so designated are the boats and barges here in controversy.

It is quite clear, therefore, that the Fleet Corporation had no interest or concern in the boats and barges in question and that the Secretary of War, by virtue of the Executive order above referred to, had full and complete control, on behalf of the United States, of the construction, use, and disposition of such boats and barges.

All of the cases cited by petitioner are readily distinguishable from the case here. No one will deny that an executive officer charged with a duty simply ministerial may not be compelled by mandamus to perform his duty. Neither will any one contend that an executive officer who oversteps the

authority of his office to the injury of the citizen may not be restrained from so doing. Nor will it be contended that an executive officer may, without authority of law, take the property of the citizen and appropriate it to the uses of the Government. If he undertakes so to do, the Courts have undoubted authority to restrain him.

United States v. Lee, 106 U. S. 196, is very much relied upon by petitioner and was very much quoted by the District Court. The nub of that decision is stated on page 219, as follows:

What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.

It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it

may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislature, to deprive any one of life, liberty, or property without due process of law or to take private property without just compensation.

This is no such case.

Respectfully submitted,

LOW G. HUGHES,

Special Assistant to the Attorney General.
St. Louis, April, 1936.



SUPREME COURT OF THE UNITED STATES.

No. 718.—OCTOBER TERM, 1925.

271

Edward F. Goltra, Petitioner,
vs.
John W. Weeks, Secretary of War of
the United States; Col. T. Q. Ash-
burn, Chief Inland and Coastwise
Waterways Service, etc.

On Writ of Certiorari to
the United States Cir-
cuit Court of Appeals
of the Eighth Circuit.

[June 7, 1926.]

Mr. Chief Justice TAFT delivered the opinion of the Court.

This was a suit in equity brought in the United States District Court for the Eastern District of Missouri, and reaches here from the Circuit Court of Appeals for the Eighth Circuit by certiorari. The general purpose of the bill filed by Edward F. Goltra, petitioner here, was to enjoin the seizure of a fleet of towboats and barges on the Mississippi River which had been held by him as lessee. It charged that the Secretary of War, the Chief of Engineers, and Colonel T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service, were engaged in a conspiracy unlawfully to deprive him of the boats. He sought to enjoin the threatened seizure of them and to have those of them which had already been taken restored to his possession.

The lease to Goltra was made May 28, 1919, by General Black, Chief of Engineers, as the lessor, by direction of the Secretary of War, acting for the United States. It leased nineteen barges nearing completion, and three or four towboats not yet constructed for a term of five years from the date the first towboat or barge was delivered to the lessee. The lessee covenanted to operate as a common carrier the whole fleet on the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal and other commodities at rates not in excess of the prevailing rail tariffs, and at not less than the pre-

vailing rail tariffs without the consent of the Secretary of War. The lessee was to pay all operating expenses of the fleet, and to maintain during the term each towboat and barge of the fleet in good operating condition to the satisfaction of the lessor. The salvage earned by any of the fleet was to be for the benefit of the United States, after deducting expenses. The net earnings above operating expenses and maintenance for each ton of cargo were to be turned over by the lessee to the Secretary of War every ninety days, for deposit to his credit in the Treasury, until the net earnings equalled the full amount of the cost of the several vessels, plus interest on the cost of 4 per cent. per annum; and then for deposit in St. Louis banks, to be held for the fulfillment of the terms of the lease. The lessee was to keep accurate detailed accounts of all tonnage moved and all moneys received and his operating expenses, subject to the inspection of the lessor or his representatives, and the overhead expenses were to be subject to the approval of the lessor, and any items objected to were to be referred to the Secretary of War, whose decision was to be final. Within three months prior to the expiration of the lease, or of any period of renewal, or sooner if so desired by the lessee, a board was to appraise the value of the fleet and the lessee was given the option of purchasing the fleet by the fund from the net earnings and by fifteen promissory notes running for fifteen years, the title of the property to remain in the United States until the payment of the whole of the purchase price of the property.

Section 8 of the lease, the important provision in this case, reads as follows:

"The lessor reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; and non-compliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels."

There was a supplemental agreement in 1921, approved by the Secretary of War, made by Lansing H. Beach, the Chief of Engineers, who had then succeeded Chief of Engineers Black. This made provision for the construction of additional facilities for the

use of the fleet and brought them within the terms of the original contract.

The bill set out that there was delay in the construction and delivery of the fleet, and that both parties after the war found difficulty in performing their undertakings; that after the making of the lease, the plaintiff had secured a good many contracts for the shipment of commodities of different kinds—of oil from New Orleans to Illinois, coal from Kentucky to St. Louis, manganese from New Orleans to St. Louis; that the rate which he arranged for was 80 per cent. of the prevailing rail rate; that when he applied to the Secretary of War, he could not obtain permission to transport some of his commodities at a proper rate; that conditions were imposed requiring the consent of officers in charge of the Mississippi Warrior, another enterprise of the Government, to Goltra's rate, and that by reason thereof it was impossible for him to operate as a common carrier; that by the acts of the Secretary of War, the plaintiff was wrongfully prevented by the lessor from carrying out the terms and conditions of the contract; that John W. Weeks and T. Q. Ashburn, named as defendants, acting in combination, wrongfully undertook to declare the contracts terminated, and on March 3, 1923, demanded from the plaintiff the immediate possession of the boats without warrant of law, and wrongfully and unlawfully threatened to take them by force, caused some of the tow-boats and barges to be actually seized, and were threatening to take them all, and that unless restrained would do so; that the plaintiff had no adequate remedy at law for the redress of the wrongs complained of. He therefore asked a temporary restraining order to be granted immediately and a restoration of the fleet to him, and a rule on the defendants to show cause why a temporary restraining order should not issue. A rule to show cause was issued on March 25, 1923, on defendant.

It appeared that the whole fleet had been taken over by Colonel Ashburn under an order of the Secretary of War. The taking over was on Sunday, and there was a purpose on the part of Colonel Ashburn anticipating an injunction to remove such of the fleet as was in St. Louis across the river to be out of the jurisdiction of the Missouri District Court. All of the defendants filed returns to the rule setting out defenses. A hearing was had on the motion for a temporary injunction, evidence was taken, and the

District Court found that the fleet had been improperly seized and should be restored to the plaintiffs and the defendants be enjoined from any attempt to resume possession until a final hearing of the case.

The defendants then sought a writ of prohibition out of this Court to prevent the further consideration of the cause by the District Court. *Ex parte United States*, 263 U. S. 389. The leave to file a petition for prohibition was denied, on the ground that the remedy by appeal from the District Court was adequate.

The evidence shows that in March, 1921, Goltra applied to have his rates as a common carrier fixed at 80 per cent. of the prevailing rail rates, and he was allowed from that time on until March, 1922, to make those rates. In March, 1922, the Secretary of War notified him that he could not approve any operation on the lower Mississippi entering into competition with the Government Mississippi Warrior line, and that he could not approve an 80 per cent. rate there. In April, 1922, Goltra objected to the limitation, saying that he had obligated himself to transport coal from Kentucky and manganese and oil from New Orleans at this rate. Thereupon the Secretary of War advised him that the rate on the lower Mississippi must be raised from 80 per cent. to 100 per cent. of the rail tariffs for the future, thus allowing him to complete the contracts of transportation already entered into, of which he had written. By letter of May 25, 1922, he was allowed a rate not less than 80 per cent. of the rail rates for many different commodities. The Secretary assured him that if he decided to operate his boats on the upper Mississippi he was authorized to carry all commodities at not less than 80 per cent., and that the officers of the Warrior Service had been instructed to cooperate with him to the fullest extent in making his fleet a success.

After a year, on March 13, 1923, the Secretary of War, in view of the little use he had made of the fleet, sent the following notice to Goltra:

"Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the

said towboats and barges as a common carrier and in other particulars.

"I therefore declare the said contract and the supplement thereto terminated. You are hereby directed upon the receipt of this notice immediately to deliver possession of the said towboats and barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States, to Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service, who will deliver this notice, and who is instructed and authorized to receive and receipt for the property herein mentioned."

April 27, 1923, the Chief of Engineers sent a similar letter to Goltra. Goltra acknowledged receipt of the Secretary's letter, but protested against the action.

The Circuit Court of Appeals reversed the action of the District Court in restoring the fleet to Goltra and enjoining the defendants, and held that the motion to dismiss and to quash the temporary restraining order should have been granted on the ground that the United States was a necessary party and could not be sued in such an action.

We can not agree with the Circuit Court of Appeals that the United States was a necessary party to the bill. The bill was suitably framed to secure the relief from an alleged conspiracy of the defendants without lawful right to take away from the plaintiff the boats of which by lease or charter he alleged that he had acquired the lawful possession and enjoyment for a term of five years. He was seeking equitable aid to avoid a threatened trespass upon that property by persons who were government officers. If it was a trespass, then the officers of the Government should be restrained whether they professed to be acting for the Government or not. Neither they nor the Government which they represent could trespass upon the property of another, and it is well settled that they may be stayed in their unlawful proceeding by a court of competent jurisdiction, even though the United States for whom they may profess to act is not a party and can not be made one. By reason of their illegality, their acts or threatened acts are personal and derive no official justification from their doing them in asserted agency for the Government. The point is fully covered by *Philadelphia Company v. Stimson*, 223 U. S. 605. In that case, the complainant owned an island in the Ohio River around which the duly authorized officers of Pennsylvania had lo-

eated a harbor line which by statute was declared to be forever firm and stable. The Secretary of War changed the harbor lines in such a way as to cross the complainant's land within the state harbor line which had never been, as complainant alleged, part of the navigable waters of the United States. The bill averred that the Secretary of War proposed to institute criminal prosecutions with heavy penalties against complainant for his proposed erection of buildings on his own land. It was objected on demurrer that this was a suit against the United States and must be dismissed for lack of its presence as a party. This Court declined to yield to the contention as a ground for dismissing the bill. The ruling is so comprehensive and refers to so many authorities and is so apt that we quote the language at pages 619 and 620:

"If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. *Little v. Barreme*, 2 Cranch, 170; *United States v. Lee*, 106 U. S. 196, 220, 221; *Belknap v. Schild*, 161 U. S. 10, 18; *Tindal v. Wesley*, 167 U. S. 204; *Seranton v. Wheeler*, 179 U. S. 141, 152. And in case of an injury threatened by his illegal action, the officer can not claim immunity from injunction process. The principle has been frequently applied with respect to state officers seeking to enforce unconstitutional enactments. *Osborn v. Bank of United States*, 9 Wheat. 738, 843, 868; *Davis v. Gray*, 16 Wall. 203; *Pennoyer v. McConnaughy*, 140 U. S. 1, 10; *Scott v. Donald*, 165 U. S. 107, 112; *Smyth v. Ames*, 169 U. S. 466; *Ex parte Young*, 209 U. S. 123, 159, 160; *Ludwig v. Western Union Telegraph Company*, 216 U. S. 146; *Herndon v. C., R. I. & P. Ry. Co.*, 218 U. S. 135, 155; *Hopkins v. Clemson College*, 221 U. S. 636, 643-645. And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. *Noble v. Union River Logging R. R. Co.*, 147 U. S. 165, 171, 172; *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. "The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

It is sought to avoid the application of this to the present case by reference to the later case of *Wells v. Roper*, 246 U. S. 335.

We think it clearly distinguishable. Wells had a contract with the Postmaster General acting for the United States, by which Roper agreed for four years to furnish for use in collecting and delivering the mail, automobiles and chauffeurs at a stipulated compensation. One provision of the contract was that any or all of the equipments contracted for might be discontinued at any time upon ninety days' notice by the Postmaster General. Later Congress authorized the latter official in his discretion to use an appropriation to buy and maintain automobiles for operating an experimental combined screen wagon and city collection and delivery service, and in order to do this, he deemed it necessary to discontinue the service of the plaintiff and gave the latter reasonable notice of the cancellation of the contract. The suit was a bill in equity to enjoin the Postmaster General from annulling the contract and interfering between the United States and the plaintiff in the performance and execution of the contract. The bill was dismissed on the ground that it was a suit against the United States. That which the bill sought to restrain was not a trespass upon the property of the plaintiff. The automobiles of the plaintiff were not to be taken away from him by the government officer. What the officer was doing was merely exercising the authority entrusted to him by law for the benefit of the Government in annulling a contract which involved no change of possession or title to property. To enjoin the officers' action was in effect enforcement by specific performance of a contract against the United States. It was an affirmative remedy sought against the Government which though in form merely restrictive of an officer was really mandatory against the sovereign. The difference between an injunction against the illegal seizure of property lawfully possessed and against the cancellation of a contract which involved no change of possession is manifest.

As the United States was not a necessary party to the bill, the action of the Circuit Court of Appeals in dismissing the bill and quashing the injunction for lack of its presence as such can not be sustained.

Coming now to the merits, however, we think that the District Court erred in granting the temporary injunction because on the facts disclosed the lease was finally terminated by the decision of the Secretary of War and the Chief of Engineers,

communicated to Goltra under section 8 of the contract. It is very clear that under that section, Goltra agreed that the lease should be terminated and that the plant and barges returned to the lessor, if the lessor decided that in his judgment there had been non-compliance with the terms and conditions of the lease. It appears from the evidence that during the season from July 15, 1922, when Goltra got the boats, they were not in use but were tied up except for the transportation of two comparatively small cargoes. The bill itself admits that Goltra did not fulfill his covenant to operate as a common carrier. He says he was prevented from doing so by the Secretary's refusal to give him the rates he wished. The contract expressly forbade rates exceeding the prevailing rail rates and forbade rates less than the rail rates except by consent of the Secretary.

The stipulation that the lessor, the Chief of Engineers, could terminate the lease if in his judgment Goltra was not complying with the obligations of the contract, did not require for its exercise that the Chief of Engineers, or the Secretary, should hold a court and have a hearing to determine the question of compliance. Goltra was given a notice of termination March 4th of the termination. He answered March 8th, but he tendered no facts upon which either the Secretary or the Chief of Engineers could base any different conclusion from that already reached from the failure of Goltra to fulfil his obligations. Both the Secretary and the Chief of Engineers were fully advised of what Goltra did and did not do under the contract.

The cases leave no doubt that such a provision for termination of a contract is valid, unless there is an absence of good faith in the exercise of the judgment. Here nothing of the kind is shown. Such a stipulation may be a harsh one or an unwise one, but it is valid and binding if entered into. It is often illustrated in government contracts in which the determination of a vital issue under the contract is left to the decision of a government officer. *Kihlberg v. United States*, 97 U. S. 398; *Sweeny v. United States*, 109 U. S. 618; *United States v. Gleason*, 175 U. S. 588; *United States v. Mason & Hangar Co.*, 260 U. S. 323; *United States v. Henley*, 182 Fed. 776; *Martinsburg R. R. Co. v. March*, 114 U. S. 549.

Nor does the circumstance that as in this case the lessor whose judgment is to prevail is a party to the contract. Of course the

Chief Engineer is not the real party in interest. He is a professional expert, as such was designated as lessor, and is really acting only as an agent for the Government. But even if this were a stipulation between private individuals, judgment of one of the parties on such an issue would be in the absence of bad faith conclusive. There are many cases where the contract makes the satisfaction of one of the parties in respect to compliance the condition precedent to fulfillment, and good faith is all that is required to justify rejection of work or product tendered. Some of them present a convincing analogy to the case. In *Magee v. Scott, & Holston Lumber Company*, 78 Minn. 11, the defendant made a contract with a Duluth tug owner to tow 7,000,000 feet of saw logs to its mill at Duluth from the north shore of Lake Superior. The contract contained a provision that in case the services should not be satisfactory, the defendant reserved the privilege of terminating the contract at any time. The defendant terminated the contract, because of defendant's delay. The evidence being clear that the decision was honest, the Court directed a verdict and the action was sustained by the Supreme Court.

Much has been said on behalf of the Government with reference to the special power of a government officer to act in such a case and without judicial assistance forcibly to repossess himself of government property, which we might find it difficult to agree with but which it is unnecessary for us to consider. Our conclusion is based on the law as it is administered between private persons. Colonel Ashburn took possession without notification to Goltra other than that which had been communicated to him by the Secretary of War terminating the contract, and it is clear from the evidence that Colonel Ashburn was anxious to take possession of the property before a writ of injunction could be sued out by Goltra, and that he sought to take the fleet out of the jurisdiction of the Court where he feared the injunction. He was not directed to make the seizure by the Secretary of War against the opposition of Goltra, but in such case he was directed to resort to legal proceedings. He stands upon the statement that he took possession without violence and therefore was rightly in possession when the order of the Court was served. He took possession, whether he took it violently or not. Concede that he did it with a show of force which was coercive. Concede that it was a seizure without process and wrong. But even so, an injunction looks only to the future. At

the hearing it was made plain that Goltra was not entitled to the possession, and the court—one of equity—would not go through the idle form of restoring the property to Goltra by way of correcting the Colonel's wrong, and then requiring a redelivery to the lessor.

As it is, the Court has taken over the fleet and given it to Goltra under bond, and the only issue that remains is whether the injunction and the restoration should be maintained or the injunction be dissolved and the fleet returned to the lessor.

On an appeal from a temporary injunction it often happens that where there is a balance of convenience and doubt as to the issue, the *status quo* under the restraining order and the restoration should be maintained until a final hearing; but in this case in the court hearing it, the issue was fully treated as if on final hearing. The right of the lessor to take over the fleet under section 8 of the contract, unless there was fraud in the judgment of termination by the Chief of Engineers, the lessor, of which we have found no evidence, is clear. We think, therefore, the injunction should be dissolved and the fleet restored to the lessor.

The claim that the petitioner has been deprived of his property without due process of law has no substance as a reason for sustaining the temporary injunction appealed from. He has had and is having due process in this very proceeding and on that issue, the decision must go against him whether the taking possession of the boats by Colonel Ashburn was warranted or not.

If Colonel Ashburn committed a breach of the peace or illegally injured any person in his taking possession, he is responsible to proper authority and to the person injured, but that does not affect the rights of the lessor under this lease or the vindication of them in this review.

The reversal of the injunction of the District Court by the Circuit Court of Appeals is affirmed, and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

A true copy.

Test

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 718.—OCTOBER TERM, 1925.

Edward F. Goltra, Petitioner,

vs.

John W. Weeks, Secretary of War of
the United States; Col. T. G. Ash-
burn, Chief Inland & Coastwise
Waterways Service, etc., et al.

On Writ of Certiorari to
the United States Cir-
cuit Court of Appeals
for the Eighth Circuit.

[June 7, 1926.]

The separate opinion of Mr. Justice McREYNOLDS.

Theoretically, everybody in this land is subject to the law. But of what value is the theory if performances like those revealed by this record go unrebuked?

An army officer, having inflated himself into judge and executioner, decided that a fleet of towboats and barges lying in the Mississippi River at St. Louis ought no longer to remain in the custody of a private citizen who held possession of them under a solemn lease and contract of sale from the United States and who, in order to make them operative, had expended upon them forty thousand dollars of his own money. Then, waiting until a Sunday arrived, he proceeded to grab the vessels by force and endeavored to run them beyond the jurisdiction of the court.

Action like that is familiar under autocracies, but the prevalent idea has been that we live under a better system.

The trial court, after taking an ample indemnifying bond, issued a temporary injunction requiring that possession of the vessels be restored and remain as before the seizure until the rights of all parties could be properly considered and determined. The Circuit Court of Appeals reversed this interlocutory order, and from its decree the cause came here by certiorari.

As a fitting climax to the high-handed measures pursued by the officer, special counsel for the United States appeared at our bar and gravely announced—"Where the executive power has pro-

nounced its finding or judgment within its proper sphere of action, a judicial judgment is not necessary to the enforcement of the executive one, for the reason that all the compulsive power of the government is in the executive department and may be exercised by it in execution of its own processes and judgment, just as it is exercised by it in the execution of judicial process and judgment."

It is easy enough for us to smile at such stuff, but, unfortunately, the evil effects are not dissipated by gentle gestures. There should be condemnation forceful enough to prevent repetition so long as men have eyes to read.

In the Circuit Court of Appeals Judge Sanborn presented a well-considered dissenting opinion and pointed out that the only judicable question before that court was whether or not the order for the injunction and the record disclosed an unlawful, improvident or abusive use of the sound discretion which the trial judge was required to exercise. 7 Fed. (2d) 838, 851; and see *Ex parte United States*, 263 U. S. 389. He could find no such abuse, and neither can I. The trial court did no more than the circumstances permitted. We should approve its action with commendation of the impelling courage and good sense.